

Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al.,: :
Plaintiffs, : :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al.,: :
Defendants. : :
-----: :

VOLUME 1

TRIAL TRANSCRIPT

December 2, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 lot of change in how you actually generate revenue and make
2 money. But it was a 45s business. It was a singles business
3 on vinyl which eventually moved to LPs, eight-tracks, if any of
4 us remember that, to cassettes, to CDs, to digital downloads,
5 and now to streaming.

6 And so, you know, there has been a lot of different
7 ways to legally obtain music throughout the years. And that
8 has changed dramatically from the way that consumers actually
9 listen to and experience music.

10 But all of those different components, even today,
11 other than maybe eight-tracks and cassettes, still make up, you
12 know, how we make money in the business, including vinyl.

13 Q. And you referred to downloads. How are sound recordings
14 available for sale as downloads in this era?

15 A. So they would be available in a download store, it would
16 be a retail environment for purchase. And they typically would
17 be available as individual tracks or also as albums.

18 Q. And for what length of time has that been the case,
19 roughly speaking?

20 A. Roughly, early 2000s. I mean, the biggest, most prominent
21 store that everyone recognizes is the Apple iTunes store,
22 download store.

23 Q. I would like to explore with you now some of the costs
24 that record companies typically incur. Can you at a high level
25 list the more significant categories of those costs.

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VOLUME 2 (A.M. Portion)

TRIAL TRANSCRIPT

December 3, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 NOTE: The witness is sworn.

2 THE COURT: All right. Good morning, Mr. McMullan.

3 THE WITNESS: Good morning.

4 THE COURT: Please proceed, Mr. Oppenheim.

5 ALASDAIR McMULLAN, called by counsel for the
6 plaintiff, first being duly sworn, testifies and states:

7 DIRECT EXAMINATION

8 BY MR. OPPENHEIM

9 Q. Good morning, Mr. McMullan. Where do you work?

11:17:07 10 A. I work at Universal Music Group.

11 Q. And what is your position?

12 A. Senior vice president of legal and business affairs.

13 Q. How long have you had that role?

14 A. Since late 2012.

15 Q. How long have you worked in the music industry?

16 A. Since December 1995.

17 Q. I'm going to ask you to speak up a little. It's a big
18 courtroom.

19 A. I'm a little hoarse, so I am going to lean in.

11:17:35 20 Q. Okay. I will as well, apparently.

21 Why did you get into the music industry?

22 A. I think like a lot of people in the music industry, music
23 was always my passion. I grew up in a musical household. We
24 listened to music. I played music. I played music in
25 symphonic bands and marching bands and rock bands. And it was

1 just a natural place for me to go as a lawyer.

2 Q. Do you still play?

3 A. Mostly now just teaching my seven-year-old twins how to
4 play the piano.

5 Q. Other than working at Universal Music Group, have you had
6 other positions within the music industry?

7 A. Prior to being at a music company, I worked at a law firm
8 that we did a good amount of music work, we represented
9 artists, we represented companies in different aspects of music
10 law.

11:18:31

11 Q. When was that?

12 A. From graduating from law school in 1988 through the end of
13 1995.

14 Q. And what did you do after that?

15 A. I went into a music company called EMI Music, which was
16 the smallest of the large record companies at the time. It was
17 the home of the Beatles, and the Beach Boys, and Frank Sinatra,
18 and Nat King Cole. Really a lot of the music I grew up with, a
19 lot of the music my parents grew up with, and it was just an
20 ideal job for me, really.

11:19:08

21 Q. And at some point did you leave EMI?

22 A. It was acquired by Universal in late 2012.

23 Q. Sorry, when was that?

24 A. Late 2012.

25 Q. And was that when you transitioned?

1 A. That's when I transitioned.

2 Q. Are there UMG companies that are plaintiffs in this case?

3 A. There are two. UMG Recordings, Inc., and Capital Records,
4 LLC.

5 Q. And what kind of companies are those?

6 A. Those are what we traditionally call record companies that
7 make, market, sell, get to consumers records, recorded music.

8 Q. And what is the distinction -- or can you explain the
9 distinction between UMG Recordings and UMPG, or Universal Music
10 Publishing Group?

11:20:04

11 A. So the Publishing Group owns, markets musical
12 compositions, the songs themselves that are written by
13 songwriters.

14 The record company side, UMG Recordings, Inc.,
15 Capital Records, LLC, owns, markets the recorded music, the
16 music you hear on the radio.

17 So Lennon and McCartney wrote the Beatles songs.
18 Their compositions might be owned and controlled by a
19 publishing company, which is actually not a Universal company,
20 it's a Sony company. We own and control the Beatles
21 recordings, the performances you hear that are embodied on
22 records.

11:20:38

23 Q. Are UMG Recordings and UMPG ultimately owned by the same
24 entity?

25 A. Ultimately they are owned by a parent company.

1 Q. And what is that parent company?

2 A. The ultimate parent is called Vivendi SA.

3 Q. And does that parent company own -- strike that.

4 What entities does Vivendi SA own, that you know?

5 A. They operate a number of businesses. They operate a -- or
6 they own a large advertising agency called Havas. A movie
7 studio called Canal+. I think they have some video game
8 companies. I'm not familiar with their full portfolio.

9 Q. As between UMG Recordings and UMPG, can you describe how
10 they are structured in terms of employees and operations?

11 A. They operate separate businesses. There is a CEO of the
12 publishing company, and it has its own legal department and
13 artists, A&R department, or artists and repertoire department.
14 It has its own facilities.

15 The record company side of the business operates
16 quite a number of different record labels that each have their
17 own CEO and marketing people and promotion people and
18 salespeople. And that rolls up into a parent recorded music
19 company.

11:22:27 20 Q. I am sorry, I didn't mean to interrupt you.

21 Can you describe several of the record labels that
22 UMG owns.

23 A. Well, it now owns EMI, which is Capital Records. It owns
24 Interscope, Decca, Verve, Republic. I mean, it owns many, many
25 record companies.

1 Q. And what kind of genres of music does UMG have within its
2 catalog?

3 A. Oh, it spans all genres of music. It obviously has some
4 of the most popular music of today, pop music. It has a large
5 rap/hip hop catalog. It has a classical catalog. It has a
6 phenomenal jazz catalog, Blue Note, Verve, Decca. Country
7 music, we have a business in Nashville. Latin music, we have a
8 business in Miami.

9 Q. I'm sorry, did you say Blue Note?

11:23:30 10 A. Blue Note.

11 Q. Can you just describe for the jury what Blue Note is?

12 A. Blue Note was -- is a historic jazz label that dates back
13 to 1939. Some of the most iconic and famous jazz recording
14 artists recorded for Blue Note. And it's a label that, you
15 know, we are pretty proud that it still operates today, still
16 puts out music today.

17 Q. Do you recall some of the artists in the Blue Note
18 catalog?

19 A. Herbie Hancock, John Coltrane. I mean, Norah Jones. I
11:24:00 20 mean, again, it spans decades of musical history.

21 Q. Are you familiar with some of the works that are asserted
22 were infringed in this case?

23 A. I am.

24 MR. OPPENHEIM: Your Honor, we would like to publish
25 PX 1, which has already been admitted.

1 THE COURT: Right. Go ahead.

2 BY MR. OPPENHEIM: (Continuing)

3 Q. Mr. McMullan, have you seen this document before?

4 A. I have.

5 Q. And can you describe what it is for the jury, please.

6 A. It's a list of the recordings that the plaintiffs in this
7 case contend were infringed by defendant in this case.

8 Q. And I have asked that we flip to the pages of the UMG
9 recordings. And are these some of the UMG recordings that are
10 in this case?

11:24:55

11 A. Those are, yes.

12 Q. And are you familiar with some of these recordings?

13 A. I am familiar with many of them.

14 Q. And why?

15 A. These -- many of these are very popular recordings that I
16 am familiar with either through working in the business or just
17 familiar with through being a fan of music.

18 Q. Were you involved in the preparation of a medley of some
19 of these recordings for purposes of the jury?

11:25:21

20 A. I was.

21 MR. OPPENHEIM: Your Honor, permission to play a
22 short medley.

23 THE COURT: Any objection?

24 MR. BUCHANAN: No, Your Honor. I will have to listen
25 to the music first, and then I may have an objection.

1 MR. OPPENHEIM: I think --

2 THE COURT: All right. Let's go ahead.

3 MR. OPPENHEIM: I think he's going to like it, Your
4 Honor.

5 NOTE: A music excerpt is played.

6 BY MR. OPPENHEIM: (Continuing)

7 Q. Mr. McMullan, can you describe the importance of
8 recordings like the ones we just heard to UMG?

9 A. That's some very key hit music that UMG has helped bring
11:27:55 10 to the world. I mean, some of those are iconic pieces of our
11 culture. I heard music that I used to play in a bar band when
12 we did covers. I heard my prom song in there, "Wonderful
13 Night."

14 I mean, it's just very important music from very
15 important recording artists.

16 Q. So let me turn now away from the legitimate recordings
17 that we just listened to and turn to the infringing ones.

18 Have you had occasion to listen to any of the
19 infringing recordings in this case?

11:28:29 20 A. I did.

21 Q. How many?

22 A. I listened to 100 of them.

23 Q. And do you recall how the 100 recordings were selected?

24 A. They were picked randomly by a computer.

25 Q. And why did you listen to them?

1 A. I understood that during the course of this case there was
 2 some issue raised about whether the recordings were in fact
 3 copies of our recordings. We believe that the technology used
 4 to find and select them is essentially infallible, but, you
 5 know, I wanted to listen for myself and put aside any possible
 6 doubt. And I listened to 100 of them.

7 Q. And when you say the issue was raised, do you know -- who
 8 do you understand raised the issue?

9 A. Oh, I understand it was raised by Cox.

11:29:27 10 Q. And was there a reason you didn't listen to all of the UMG
 11 recordings in this case?

12 A. Well, it's thousands of recordings, I think. So --

13 Q. And after you listened to them, what conclusion did you
 14 come to?

15 A. They were exact copies of our copyrighted sound
 16 recordings.

17 Q. How did they sound?

18 A. They sounded great. They sounded like exact copies of our
 19 sound recordings.

11:29:52 20 Q. In your position at Universal Music Group, do you deal
 21 with piracy issues?

22 A. Unfortunately, I do.

23 Q. So at a high level, can you describe for the jury what
 24 piracy is.

25 A. Piracy is essentially the theft of our content. It's the

1 unauthorized copying, distribution, exploitation of the
2 recordings that we own and what we market and what our business
3 is founded on.

4 Q. And are there different types of piracy?

5 A. There are different types. There have historically been
6 different types. There was a time where piracy consisted of
7 vinyl bootlegs of recordings. There was a time where cassette
8 piracy, people copying albums on cassettes and selling them was
9 the problem.

11:30:39 10 And then as with the development of the Internet,
11 Internet piracy grew as a huge problem.

12 Q. And are you familiar with -- when you say "Internet
13 piracy," can you describe several of the types of Internet
14 piracy you're familiar with.

15 A. Well, there's Internet piracy where someone might just put
16 up a website and be offering copies to directly download. And
17 there's Internet piracy like we're talking about in this case,
18 where there are peer-to-peer systems.

19 Q. And are peer-to-peer systems -- how do peer-to -- how does
11:31:14 20 peer-to-peer piracy differ from the older types of piracy that
21 you use to deal with, say, for instance, vinyl or cassettes
22 that you were describing?

23 A. Well, in those cases someone needed to make copies of our
24 recordings and get them one-to-one out to somebody who wanted
25 to acquire a pirated copy.

1 Q. Let me interrupt you. When you say "one-to-one," what do
2 you mean by that?

3 A. Well, like a copy would be made in a factory or somewhere
4 and it had to get into someone's hand. With Internet piracy,
5 peer-to-peer piracy, unlimited copies can be generated and
6 distributed across the Internet.

7 Q. Can you describe, at a consumer level, how peer-to-peer
8 piracy works?

9 A. So if -- well, at a user level, someone might have a copy
11:32:07 10 of the recording on their computer, on their hard drive, as
11 well as software that allows them to connect into a
12 peer-to-peer system. And it allows them to distribute a copy
13 of that recording to anyone else who has that peer-to-peer
14 software client installed and connected to that system.

15 So that user can upload it into a system where
16 millions of people can have illegal access to the recording.

17 Q. When -- strike that.

18 I think you said earlier that the business of UMG is
19 to sell recordings; is that right?

11:32:52 20 A. Yeah, to sell, distribute, license, market recordings.

21 Q. When UMG sells recordings through a service like iTunes or
22 Amazon, what rights does UMG give the consumer to distribute
23 the recordings on a peer-to-peer service?

24 A. The consumer gets no rights to do that.

25 Q. Why not?

1 A. Because that would allow a consumer to be in direct
2 competition with our legitimate sales of that music.

3 Q. In the course of your personal work and time within the
4 music industry, how has peer-to-peer piracy impacted the
5 companies you've worked at?

6 A. It had a very severe impact. I was at a record company at
7 the time that the first peer-to-peer service launched, it was
8 called Napster, and then multiple other large services allowing
9 millions and millions of people to illegally distribute our
10 recordings developed.

11:33:56

11 And it had a devastating impact on our business, on
12 the finances of our business, on our ability to invest in new
13 content. And it was all happening at a time when we were
14 trying to figure out what's the best and safest way to sell,
15 market, distribute music through the Internet. And here we
16 were doing it in competition with millions of folks who were
17 giving it away and taking it for free.

18 Q. When these peer-to-peer networks were first launched, how
19 did the record industry deal with it?

11:34:32

20 A. We sued Napster. And then we sued another set of
21 services, Kazaa and Grokster. That case actually went to the
22 Supreme Court. And then we sued another company called
23 LimeWire.

24 We engaged in educational programs to try to educate
25 consumers that they shouldn't be doing this. And we worked

1 hard to develop a legitimate business to try to compete with
2 this distribution of free music illegally.

3 Q. You mentioned a moment ago that Grokster and Kazaa went to
4 the Supreme Court. What happened there?

5 A. We won that case unanimously. And, you know, each of
6 those companies and businesses, Napster, Grokster, Kazaa,
7 LimeWire, they were all eventually shut down through an
8 expensive legal process.

9 Q. Are you familiar with the peer-to-peer networks at issue
11:35:27 10 in this case?

11 A. I am.

12 Q. Can you list them?

13 A. I think there is BitTorrent, Ares, eDonkey -- BitTorrent,
14 Ares, eDonkey -- there might be others. Those are the ones I
15 remember.

16 Q. With respect to those --

17 A. Gnutella, I think, is one.

18 Q. So eDonkey, Ares, Gnutella, and BitTorrent. With respect
19 to those four peer-to-peer networks at issue in this case, why
11:35:56 20 hasn't the music industry just sued those entities?

21 A. There's no company to sue. There's no entity. This is
22 now -- peer-to-peer moved to a decentralized model where,
23 again, consumers have software on their computers and simply
24 communicate with each other. Nothing goes through a central
25 server. There's no central company to sue.

1 MR. BUCHANAN: Your Honor, can we approach?

2 THE COURT: Yes, sir.

3 NOTE: A sidebar discussion is had between the Court
4 and counsel out of the hearing of the jury as follows:

5 AT SIDEBAR

6 MR. BUCHANAN: So I just wanted to make sure that
7 this witness -- none of the testimony of the prior witness was
8 revealed to this witness before he testified.

9 MR. OPPENHEIM: No. If you think that we haven't
11:36:54 10 discussed this issue for ten years with these witnesses, you'd
11 be kidding yourself.

12 MR. BUCHANAN: It just seemed to me --

13 THE COURT: Well, what do you want me -- you want me
14 to have Mr. Oppenheim ask whether he spoke to Mr. --

15 MR. BUCHANAN: Well, if he represents that he didn't
16 talk to him before he -- just now and testifying and discussed
17 with him Mr. Kokakis' testimony, then I accept that.

18 MR. OPPENHEIM: Okay. I did not disclose any of
19 Mr. Kokakis' testimony to Mr. McMullan.

11:37:23 20 MR. BUCHANAN: All right.

21 THE COURT: Okay. Thank you.

22 NOTE: The sidebar discussion is concluded; whereupon
23 the case continues before the jury as follows:

24 BEFORE THE JURY

25 THE COURT: Please proceed.

1 BY MR. OPPENHEIM: (Continuing)

2 Q. A moment ago, Mr. McMullan, you described a variety of
3 different things that the industry has done in response to
4 peer-to-peer piracy. Did the industry also sue individual
5 peer-to-peer users?

6 A. There was a time where we did do that.

7 Q. Can you explain why the industry did that.

8 A. At that time, I think there were a couple -- there were a
9 couple of reasons for it. One, we needed to establish in this
10 sort of new form of piracy that this was illegal and that you
11 should not do it. So we needed the legal precedent to do that.

12 And secondly, peer-to-peer piracy became such a
13 phenomenon that we were in danger of a generation of people
14 believing that music is free, does not have to be paid for.
15 And we wanted to send that -- a message that that is not the
16 case. And we wanted to change behavior and perception on that
17 point.

18 Q. And did there come a point in time where the industry
19 stopped filing those types of suits on a regular basis?

11:39:09 20 A. There did.

21 Q. And why?

22 A. I think we found other ways. You know, we don't sue
23 anyone lightly. We're a music business, we're not a
24 litigation/lawsuit business. And we believed that there were
25 -- the precedence were sufficiently established and that there

1 were other means by which we could deal with this type of
2 piracy without having to clog the courts with hundreds of
3 lawsuits.

4 Q. And what were those other means?

5 A. Well, we -- again, we engaged in educational means. But
6 one of the means was sending notices to Internet service
7 providers notifying them of repeat infringers on their systems.

8 Q. Well, you said notifying them of repeat infringers.

9 A. Well, notifying them of infringers on their systems and,
10 11:40:10 by nature, infringers who would continue to do it repeatedly.

11 Despite the fact that we had already engaged in a large
12 litigation program against consumers and had established
13 precedence against peer-to-peer networks, there were people
14 that continued to do this.

15 Q. Were you able to identify who was a repeat infringer and
16 who was not when you were sending notices?

17 A. No. I think our notices were just -- were just
18 identifying there is someone infringing this content on an ISP,
19 and the ISPs can identify who's a repeat infringer.

11:40:47 20 Q. So what role do the ISPs play in peer-to-peer piracy?

21 A. Well, the ISPs provide the network by which the piracy
22 occurs and have the ability to -- when notified about it, to
23 stop it.

24 Q. And so what does -- what did the record industry expect an
25 ISP, like Cox, to do to address peer-to-peer piracy?

1 A. Well, we expected them to do something. We expected them
2 to work with their customers that were infringing to stop the
3 infringement. And if a customer continued to do it, ultimately
4 they might have to lose their service and be terminated.

5 Q. All right. Are you familiar with the term "infringement
6 notice"?

7 A. I am.

8 Q. Can you describe for the jury, at a high level, what an
9 infringement notice is.

11:41:41 10 A. It's a notice to a company or to someone that on their
11 system there is infringement occurring of a particular work.

12 Q. Have you ever heard the term "take-down notice"?

13 A. Take-down notice, yes.

14 Q. And is an infringement notice and a take-down notice the
15 same thing, or are they different?

16 A. Well, I mean, a take-down notice might also notify you of
17 infringement. But a take -- the purpose of a take-down notice
18 really has to do with the DMCA. And it's a -- you know, a
19 notice to a company like YouTube, saying, we found this content
11:42:20 20 on your system, take it down.

21 And if they do comply with taking it down within the
22 parameters of the law, then, you know, YouTube can avoid a
23 liability for that infringement that it has been notified of.

24 Q. Are infringement notices, in your experience, typically
25 successful?

A. McMullan - Direct

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1 A. Infringement notices are successful if the company that's
2 receiving them takes them seriously and acts upon them.

3 Q. And what is -- what does the record industry expect an ISP
4 to do in response to an infringement notice?

5 A. Again, we -- what we expect them to do is take them
6 seriously, notify their customer, and work with that customer
7 to make the infringement stop.

8 Q. Are you familiar with the Copyright Alert System?

9 A. I am.

11:43:24 10 Q. And what was -- let me ask you this. Is the Copyright
11 Alert System still in effect?

12 A. No.

13 Q. Okay. So what was the Copyright Alert System?

14 A. The Copyright Alert System was an attempt by some content
15 owners and some ISPs to work together to see if they could
16 educate and inform consumers within the parameters of a
17 program, to see what impact it might have on infringement
18 across those particular ISPs' networks.

19 And to provide some learnings back that might help in
11:44:04 20 understanding this consumer behavior and how to curb
21 infringement through this consumer behavior.

22 Q. From a time frame perspective, do you know when CAS began
23 roughly and ended roughly?

24 A. I'm thinking 2013 to very early 2017.

25 Q. And were you involved -- I am sorry.

A. McMullan - Direct

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1 How long did it take to -- do you know how long it
2 took to negotiate the agreement to start CAS?

3 A. I believe it took a number of years to put that in place.

4 Q. And were you involved in any way in those negotiations?

5 A. I didn't -- I certainly didn't negotiate anything
6 directly. I was informed of them from time to time.

7 Q. And at the time those negotiations were going on, where
8 were you working?

9 A. At the time of the negotiations, the bulk of them, I would
11:45:02 10 have been working at EMI.

11 Q. And then when you moved to Universal Music Group, were you
12 involved at all?

13 A. I think when I moved to Universal Music Group, by that
14 time CAS had just -- would have just launched. You know, our
15 company was acquired in late 2012, and I think maybe it
16 launched in 2013, shortly thereafter.

17 Q. And was UMG a participant in CAS?

18 A. It was.

19 Q. Who else do you recall was a participant in CAS?

11:45:35 20 A. Other record companies, Sony and Warner. The movie
21 companies were involved. And then a number of ISPs were
22 involved.

23 Q. When you say "movie companies," what do you mean by that?

24 A. Film, the film industry, movie studios.

25 Q. Like Sony Pictures?

1 A. Disney, Sony, Warner Brothers.

2 Q. And you said several ISPs?

3 A. And several ISPs. I know -- I think Verizon --

4 Q. Do you recall --

5 A. -- Time Warner, Comcast.

6 Q. Did Cox participate?

7 A. No, Cox did not participate.

8 Q. Do you know whether there were any music publishers who
9 participated in the CAS?

11:46:23 10 A. No, music publishers were not involved in CAS.

11 Q. Can you explain how CAS sought to address peer-to-peer
12 infringement.

13 A. You know, CAS established a board. It established an
14 executive committee. It created a full educational program.
15 And then it prescribed some parameters that the ISPs could use
16 to deal with notices that were given to them by the content
17 owners of infringements occurring on their system.

18 Q. Do you recall whether there was a -- what's called a
19 graduated response within CAS?

11:47:16 20 A. I guess it was a graduated response. There were
21 educational steps where they would tell a consumer or one of
22 their customers, hey, we have -- this infringement has occurred
23 on your system.

24 There were -- there was an increased step where they
25 would force the consumer to interact with them and acknowledge

1 they got these notices.

2 Q. What do you mean by "interact with them"?

3 A. I guess it might put up -- if you tried to use your
4 Internet, it might put up a page saying, you've gotten this
5 infringement notice and, you know, click here and acknowledge
6 it.

7 They had a call center where they might require
8 people to call in. Part of what CAS was was operating a, you
9 know, a call center to field questions.

11:48:04 10 And then there were, I guess, what you call
11 mitigation measures if it escalated further that might throttle
12 down your bandwidth of your Internet connectivity or slow it
13 down, something to get a user's attention even more.

14 Q. And do you recall how many steps there were within the CAS
15 graduated response?

16 A. I think there were these sort of three areas of education,
17 acknowledgement, mitigation. But I think it took you
18 through -- it could be either five or six steps. The
19 parameters were given, but each ISP could implement them in a
11:48:45 20 slightly different way based upon what they were interested in,
21 and that would give different learnings on how consumers might
22 react to different methods of communications to them.

23 Q. When the record industry was sending notices in CAS, did
24 you know how many steps the infringer in the notice had already
25 gone through?

1 A. No.

2 Q. Can you explain that?

3 A. Well, we were identifying that an infringement occurred
4 and sending that notice to the ISP. But it is the ISP that
5 knows, well, who that infringer is and how many times they have
6 been caught doing this before.

7 Q. Well, if you didn't know, was it possible -- do you
8 understand it was possible that an ISP may have received a
9 notice for a subscriber which would have been past the sixth
10 step?

11:49:53

11 A. They could easily have gotten notices past the sixth step.

12 Q. And what did you understand that CAS obligated the ISPs --
13 excuse me. What did you understand that the ISPs had to do
14 with notices that were past the sixth step?

15 A. Past the sixth step, CAS didn't deal with it. CAS was
16 looking at with these six steps, what has occurred and what can
17 we learn from that. Past the sixth step, the ISPs had to
18 comply with the law.

19 Just like they had to comply with the law for notices
11:50:31 20 they might be getting from other copyright holders like the
21 publishers outside of CAS.

22 Q. What obligations did an ISP participating in CAS have to
23 terminate repeat infringers?

24 A. Well, CAS' six steps didn't have anything to do with
25 terminating infringers. That's not what it was looking at.

1 But all of these companies had policies that noted that users
2 could be terminated if they engaged in repeat infringement.

3 Q. In the course of the discussions to create CAS, do you
4 recall there ever being a discussion about having a 14-step
5 graduated response policy?

6 A. That I don't recall.

7 Q. Do you -- do you recall how many steps the record industry
8 wanted CAS to have?

9 A. I believe we wanted three steps. We believed three steps
11:51:36 10 was something that we had seen in graduated response programs
11 in other countries that had been effective.

12 Q. Can you describe that a little more.

13 A. There were certain countries, in France there was a
14 program called HADOPI that mandated three steps before
15 termination. And the learnings we received from that was that
16 greatly reduced peer-to-peer piracy across networks that were
17 participants in HADOPI.

18 I think there were similar programs in New Zealand
19 and some other countries.

11:52:15 20 Q. Sorry, I didn't mean to interrupt you.

21 A. That's okay.

22 Q. Do you think CAS was effective?

23 A. I don't think CAS proved to be a solution to anything.
24 Some learnings may have come out of it that were useful. If it
25 were -- if it were highly effective, we would still be

1 operating it today. Certainly as compared with an ISP's
2 obligation at law to deal with notices, I don't think the CAS
3 construct added anything to it that was particularly useful.

4 Q. Can you explain a little -- maybe a little more clearly
5 for us what you mean by obligations within CAS and obligations
6 within the law.

7 A. Well, CAS, again, was looking at --

8 MR. BUCHANAN: I am going to object, Your Honor. He
9 is giving legal opinions now.

11:53:15 10 THE COURT: Well, let's see where he goes.

11 Overruled. His understanding of what obligations are, he can
12 testify to that.

13 A. CAS was looking at this set of notices within this
14 graduated response, seeing what the consumer behavior was when
15 different mitigation measures were -- and educational measures
16 were employed.

17 At law, my understanding is if someone is notified
18 that their system is being used to infringe and they are
19 notified that that is happening repeatedly, they need to act to
11:53:54 20 stop that. That's certainly what we expect of the company.

21 BY MR. OPPENHEIM: (Continuing)

22 Q. I believe you testified earlier that CAS was terminated.
23 Were you involved in that decision?

24 A. I was.

25 Q. And can you describe why CAS was terminated?

1 A. Well, again, I just think the experiment had concluded.
2 We had developed whatever information we could out of it. And
3 I just don't -- it was not viewed as a solution to this type of
4 piracy.

5 Q. And did the record industry send notices to Cox?

6 A. It did.

7 Q. And were those notices within CAS?

8 A. No.

9 Q. Why not?

11:54:48 10 A. Because Cox didn't participate in CAS.

11 Q. Do you know who actually physically sent the notices to
12 Cox in this case?

13 A. I believe our trade association, RIAA, the Recording
14 Industry Association of America.

15 Q. Keep your voice up.

16 A. I know. I am just getting a little hoarse. Sorry.

17 Q. What is UMG's relationship with RIAA?

18 A. We are a member of RIAA.

19 Q. And is UMG involved in operating the RIAA?

11:55:30 20 A. Well, no, the RIAA has its own president and officers,
21 et cetera, but we are on the Board of the RIAA. We fund the
22 RIAA.

23 Q. So what was the goal of sending notices to Cox,
24 infringement notices to Cox?

25 A. To inform them that infringement was happening on their

1 system and to get them to act to stop it.

2 Q. And why did UMG bring this lawsuit?

3 A. Because in response to those notices, our understanding is
4 Cox did essentially nothing to stop or curb the infringement of
5 these users across its system.

6 Q. Why not sue the individual infringers instead?

7 A. One, we don't know who they are. They are Cox customers.
8 Again, we were trying to avoid having multiple lawsuits against
9 multiple unknown people when we believed we had another

11:56:30 10 alternative that would avoid litigation. Which is notifying
11 Cox and having Cox deal with their infringing customers to stop
12 the infringement.

13 Q. Why does Universal Music Group enforce its copyrights?

14 A. They are our sole assets, essentially. They are the
15 engine of our business. If we don't enforce our copyrights and
16 allow anyone to simply copy our recordings and use them, then
17 we don't have a business because we are competing with someone
18 giving away our product for free.

19 Q. Is this case important to the music industry?

11:57:09 20 A. This case is very important to the music industry.

21 Q. Why?

22 A. Again, this is about a big company that did not take steps
23 to stop the wholesale theft of our copyrights on its system.
24 And we need to do this to protect our business, our employees,
25 our artists, all of whom rely on the revenue generated by our

1 sale of, marketing, distribution of recordings.

2 MR. OPPENHEIM: I pass the witness, Your Honor.

3 THE COURT: All right.

4 All right. Mr. Buchanan, cross-examination.

5 MR. BUCHANAN: Yes, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. BUCHANAN:

8 Q. We have a couple of binders here.

9 Good afternoon, Mr. McMullan.

11:58:14 10 A. Good afternoon.

11 Q. I just have a few questions for you. I would appreciate
12 it, if possible, if you could give yes or no answers. If it
13 calls for a yes or no answer, could you do that for me?

14 A. Sure.

15 Q. Okay. So how many sound recordings are involved in this
16 case that are owned by UMG?

17 A. I would have to look at the list --

18 Q. I just need a no or --

19 A. To get a number. I don't know the number off the top of
11:58:50 20 my head.

21 MR. OPPENHEIM: Mr. Buchanan, if you could let him
22 finish answering, that would be great.

23 Q. You don't know?

24 A. Off the top of my head, I don't know. I mean, they just
25 showed a chart that has them all listed. So you could -- we

1 could figure out the number. I think it was thousands.

2 Q. Okay. And how many -- so that exhibit that you looked at,
3 those sound recordings are attached to the lawsuit, are they
4 not?

5 A. Attached to the complaint in the lawsuit?

6 Q. Yes.

7 A. Yes.

8 Q. And you reviewed that before it was filed?

9 A. I did.

11:59:24 10 Q. So did you not look and determine how many sound
11 recordings were on there that were --

12 A. I just don't remember the count. Again, we could look at
13 it and count.

14 THE COURT: All right. Let's move on. He's answered
15 your question.

16 Q. So you think it is thousands. So how many sound
17 recordings does UMG own total?

18 A. I don't know. Hundreds of thousands. Possibly millions.

19 Q. Are you the legal counsel for the company, right?

11:59:49 20 A. I am one of the legal counsels for the company.

21 Q. So you don't know whether it is hundreds of thousands or
22 millions?

23 THE COURT: He's answered the question. Let's not --

24 BY MR. BUCHANAN: (Continuing)

25 Q. Okay. So you talked about lawsuits against individual --

1 what I call subscribers or file sharers, that they -- there was
2 a lot of lawsuits filed during a period of time against
3 individuals; is that right?

4 A. There were a number of lawsuits filed at -- during a
5 period of time against individuals, yes.

6 Q. Do you know how many? Was it thousands?

7 A. Hundreds, could have been thousands.

8 Q. And these were -- involved not only your company, but
9 other sound recording companies?

12:00:36 10 A. Yes.

11 Q. Okay. And did you assist in this litigation when you were
12 at EMI or --

13 A. Which litigation?

14 Q. The litigation against the individual subscribers.

15 A. I testified in a couple of those cases, in one, yeah.

16 Q. Okay. So you're familiar that there were thousands of
17 them?

18 A. There were many cases filed.

19 Q. Okay. So you -- a minute ago, you testified that you
12:01:02 20 weren't bringing these types of lawsuits presently because you
21 couldn't find who they were.

22 A. Well, no, that's not the only reason. We --

23 Q. But did you testify to that just a minute ago?

24 A. I said we don't know who they are.

25 Q. Okay. And so -- but you can find out who they are, can't

1 you, by suing and then asking the Internet service provider to
2 give you the name because you have the IP address?

3 A. I believe we could do that and file what are known as John
4 Doe lawsuits.

5 Q. Right. That's what you did in those 5,000 lawsuits?

6 A. Yeah. And when we were doing that, the ISPs complained
7 mightily that they didn't like us --

8 Q. But you got the information --

9 A. -- pursuing their subscribers.

12:01:48 10 Q. So you got -- you were able to get the information
11 ultimately through the courts, who they were?

12 A. Ultimately through a cumbersome process --

13 Q. Okay.

14 A. -- of having to file many, many litigations, we were able
15 to -- we were able to do that.

16 Q. Okay. So -- and in -- for instance, in this case, you and
17 the other sound recording companies utilized MarkMonitor,
18 right?

19 A. Yes.

12:02:15 20 Q. And MarkMonitor is able, through its detection
21 capabilities, to find out the IP address for anybody that's
22 infringing on one of these peer-to-peer networks, is it not?

23 A. I think that's right.

24 Q. Right. And that goes into the notice, does it not?

25 A. I think that's right.

1 Q. And then Cox can tell from the IP address who the
2 infringer is?

3 A. Cox can tell.

4 Q. Right. So -- and is that the process you used with these
5 5,000 lawsuits to find out who these individual subscribers
6 were?

7 THE COURT: Mr. Buchanan, I didn't hear the number
8 5,000. He said hundreds, maybe thousands. So let's not put
9 information in the record, please, in your question which is
10 not in evidence.

12:02:51

11 MR. BUCHANAN: Okay.

12 BY MR. BUCHANAN: (Continuing)

13 Q. For all those lawsuits that were filed, whether it was
14 hundreds or thousands, is that how you determined who the
15 subscriber was?

16 A. I don't recall.

17 Q. Okay. Now, you testified that you wanted Cox to do
18 something about this infringement, right?

19 A. I did.

12:03:13

20 Q. Okay. And Cox is, according your counsel's opening, the
21 eighth largest Internet service provider?

22 A. I did not hear his opening.

23 Q. I know. But do you agree that it's eighth, or do you not
24 know?

25 A. I have no idea.

1 Q. Okay. Do you know if Verizon is bigger?

2 A. Do you want me to guess on the size of different
3 companies? Verizon might be bigger. I don't know.

4 Q. Well, you testified that you were familiar with the
5 Copyright Alert System that involved Verizon and a bunch of
6 other ISPs, right?

7 A. I did.

8 Q. Okay. And so, do you know who those other ISPs were,
9 other than Verizon and Comcast?

12:03:55 10 A. There was -- Time Warner was in there.

11 Q. AT&T?

12 A. I think so.

13 Q. Cablevision?

14 A. I don't recall, but maybe.

15 Q. Basically the five largest ISPs, right?

16 A. If you say so.

17 Q. No, I -- do you know?

18 A. There were five large ISPs.

19 Q. Okay. And the other participants in this Copyright Alert
12:04:12 20 System were all the plaintiffs in this case, correct?

21 A. No.

22 Q. The recording companies?

23 A. The recording plaintiffs in this case, yes.

24 Q. Okay. And how much of the sound recordings in the United
25 States do those plaintiffs own? 85 percent?

1 A. I've heard that number. I don't know, today, how much
2 the --

3 Q. And you --

4 A. -- three majors own.

5 Q. -- said Disney was involved?

6 A. I think that the large movie companies were involved, like
7 Disney and Warner and --

8 Q. Right.

9 A. -- Sony Pictures.

12:04:49 10 Q. Okay. And so, essentially, all the large entertainment
11 companies were Disney, Sony, that not only music, but film and
12 other rights, copyrights regarding entertainment?

13 A. I think only recording companies and audio/visual film
14 were involved.

15 Q. So essentially it covered a vast majority of the
16 entertainment companies and a vast majority of the Internet
17 service providers, correct?

18 A. It included who it included, which were --

19 Q. Okay.

12:05:22 20 A. -- large movie companies, large record companies, and
21 large ISPs, and some consumer groups.

22 Q. And you said that negotiations went on for two years?

23 A. It went on for years. I don't remember how many years.

24 Q. So lots of lawyers and lots of business people were
25 involved?

1 A. I think there were lawyers involved at the trade
2 associations. I think they kept lawyers informed at their
3 trade association members, and I assume the ISPs had lawyers
4 involved.

5 Q. Right. And the Recording Industry Association of America,
6 who represents the sound recording companies, they were
7 involved?

8 A. They were involved.

9 Q. Okay. And then actually, ultimately, a new entity was
10 created, right? The Center for Copyright Infringement?

11 A. That was --

12 MR. OPPENHEIM: Objection. If I heard that right,
13 that's certainly not the name of it. And it's an inappropriate
14 question. It wasn't the Center for Copyright Infringement,
15 which is what I heard. Maybe I misheard it.

16 THE COURT: Okay.

17 THE WITNESS: It would be a terrible name for any
18 kind of business.

19 BY MR. BUCHANAN: (Continuing)

12:06:32 20 Q. Center for Copyright Information?

21 A. Okay.

22 Q. Was that -- you're familiar with that?

23 A. Yes, something was created that had a --

24 Q. And they were located in Washington, D.C.?

25 A. I assume that's where they were located.

1 Q. Do you know who was the head of it?

2 A. I don't off the top of my head, no.

3 Q. But it was funded by all these entities that were part of
4 CAS?

5 A. I think it was funded half by the content owners and half
6 by the --

7 Q. Right.

8 A. -- Internet service providers.

9 Q. And so, you said that you wanted them to do three, at
12:06:59 10 least do -- take three notices and then terminate; is that
11 right?

12 A. We think a three-notice graduated response would be very
13 effective in curbing infringement of this nature.

14 Q. Okay. So three notices and then what? That's what I
15 don't get. What happens after three?

16 A. Well, after three, if a subscriber simply will not stop
17 using these peer-to-peer systems to infringe our content, we
18 think that the Internet service provider should terminate them.

19 Q. So you said three. And if they continued, how many more
12:07:41 20 infringement notices before you really think they should shut
21 down the family, or the hospital, or the military base,
22 whatever might --

23 MR. OPPENHEIM: Objection.

24 THE COURT: Sustained. Ask the question,
25 Mr. Buchanan.

1 MR. BUCHANAN: Okay.

2 BY MR. BUCHANAN: (Continuing)

3 Q. So we're talking about a residential home, okay? At what
4 point should they cut off their Internet service?

5 A. I think that if the ISP takes appropriate action to notify
6 and inform its customer what's happening on the system that
7 through their household is illegal and shouldn't happen, we
8 think that if that continues to occur and it occurs three
9 times, I do think it might be appropriate to terminate that
10 customer.

12:08:34

11 But we would hope it doesn't get to that. We're not
12 here to require terminations. We want responsible companies to
13 do responsible things, to work with their customers to stop
14 infringements.

15 And certainly in the -- as to what Cox did, they fell
16 down on that responsibility entirely.

17 Q. Okay. So I want to get back to the three. What you
18 negotiated under CAS was six steps, or alerts rather, right?

19 A. I think --

12:09:15

20 Q. Each step had an alert with it that got a little bit
21 different, depending on the content owner?

22 A. The alert was what the ISP sent to its customer.

23 Q. Right. That was a notice, right?

24 A. No, the notice was what we sent to the ISP.

25 Q. Yeah. So do you know, did the alert attach the notice?

1 A. I believe the first -- I believe in -- however CAS was
2 implemented by an ISP, the first alert probably attached the
3 notice.

4 Q. So didn't -- and so with Cox -- are you familiar with Cox?
5 We would take the notice that, say, your company sent, and we
6 would attach an e-mail with that and then send it by e-mail.
7 Did that --

8 MR. OPPENHEIM: Objection.

9 A. My understanding is Cox --

12:10:03 10 THE COURT: He just asked whether it's his
11 understanding. Overruled.

12 BY MR. BUCHANAN: (Continuing)

13 Q. I just said, did your -- did you ever see the e-mail that
14 Cox forwarded along with the notice?

15 A. My understanding is the first notice that Cox received of
16 infringement of a subscriber, it did not forward.

17 Q. Okay. Let's go to the next one. Do you know why they
18 didn't forward them? Do you know why? Do you know why
19 because --

12:10:25 20 A. I can't fathom why they wouldn't forward the first notice.

21 Q. Do you know that in fact, that because 50 percent --

22 THE COURT: He said he didn't know.

23 MR. BUCHANAN: Okay.

24 THE COURT: Now you're testifying again. We're going
25 to get into trouble here, Mr. Buchanan.

1 MR. BUCHANAN: Okay.

2 THE COURT: Ask questions, please.

3 BY MR. BUCHANAN: (Continuing)

4 Q. So the second notice, we'll just talk about the second
5 notice.

6 A. Okay.

7 Q. There's an e-mail, it goes along and it accompanies the
8 notice, an e-mail from Cox accompanying the copyright notice
9 from the content owner. Are you aware of that?

12:10:55 10 A. Not really, but okay.

11 Q. So -- okay. Did you ever see the e-mail warning that Cox
12 would send that -- did you ever see that?

13 A. I don't recall seeing it. I may have seen it.

14 Q. Okay. So I'm just wondering, did you see the alert or
15 e-mail that the ISPs that are a part of CAS, that they sent
16 along with their notice?

17 A. Well, I think those were negotiated as part of the
18 program.

19 Q. Right. But did you actually see the -- what the alert
12:11:25 20 said? You know, in other words, the information in the e-mail
21 that was sent by the ISP along with the notice from MarkMonitor
22 or whoever sent it?

23 A. Did I see it? No.

24 Q. No. Okay. So you couldn't compare the two, you don't
25 know either one?

1 A. Without looking at something, I could not compare the two.

2 Q. Okay. I was just wondering if you looked at it at the
3 time. So you've said three and do something.

4 But what was negotiated with the ISPs that -- you
5 know, that -- I think you admitted that controlled a large
6 percentage of the Internet service provider market, they said
7 six --

8 MR. OPPENHEIM: Objection. That misstates
9 Mr. McMullan's testimony.

10 THE COURT: Yeah, sustained.

11 MR. OPPENHEIM: Can we stop this?

12 THE COURT: Sustained.

13 MR. BUCHANAN: Okay.

14 BY MR. BUCHANAN: (Continuing)

15 Q. All right. So the five large Internet service providers
16 that were part of CAS, okay, they negotiated with all these
17 music companies, entertainment companies, six, six alerts or
18 notices, correct?

19 A. They negotiated a program --

20 Q. Right.

21 A. -- that included a lot of things. It included funding a
22 CCI. It included creating an educational program. And it
23 included -- and it included a graduated response type program
24 where we would look at what happened when they engaged in this
25 process, which could have been five or six notices across these

1 sort of three areas of escalation.

2 Q. Okay. Right. And so, they would send -- it was one a
3 week per subscriber, right, every seven days?

4 A. I don't recall that.

5 Q. Okay. Would you take my word for it, or do you want me to
6 show you the document?

7 THE COURT: He said he doesn't know the answer.

8 MR. BUCHANAN: Okay.

9 THE COURT: You're testifying -- please, ask your
10 next question.

11 MR. BUCHANAN: I just didn't want to waste the
12 Court's time with showing the document.

13 BY MR. BUCHANAN: (Continuing)

14 Q. Okay. So you don't know --

15 THE COURT: Well, you know the way to do it. If you
16 want to try and refresh his recollection, do so.

17 Q. All right. So do you know -- so you are not aware of
18 that. Do you know that they did not terminate? There was an
19 agreement not to terminate?

12:13:32 20 A. There wasn't an agreement not to terminate. For those six
21 notices, there was no termination required. But, I mean, the
22 program itself didn't impact what they had to do under the law.

23 Q. Okay. But --

24 A. They were presumably receiving notices other than the ISP
25 notices that the particular participants in CAS were receiving.

1 They were probably receiving notices from book publishers and
2 gaming companies and music publishers.

3 THE COURT: Okay. All right. You have answered the
4 question. Wait for the next question, please.

5 THE WITNESS: Sure.

6 BY MR. BUCHANAN: (Continuing)

7 Q. Okay. So during the CAS program, what -- do you know
8 if -- whether it was pursuant to CAS or outside of that,
9 whether these five Internet service providers were terminating
10 anyone that was receiving notices from your client and the
11 other recording companies that were part of CAS?

12 A. I'm sorry, I just didn't get the question.

13 Q. Okay. Do you know if Verizon and Comcast, Time Warner,
14 AT&T, or Cablevision, who were all part of the MOU that made up
15 CAS, whether they were terminating anybody in response to the
16 notices from the other members, the content owners who were
17 members of the CAS?

18 A. I don't know.

19 Q. Okay. So MarkMonitor is the -- I think you might have
12:15:04 20 said this already -- was the investigative infringement company
21 used in this case, right?

22 A. Right. They provided technology for us.

23 Q. And they were the same company that was used under CAS to
24 investigate infringement by the five large ISPs and to send
25 notices, correct?

1 A. MarkMonitor was used to generate notices as to Cox.
2 MarkMonitor was used to generate notices within the CAS
3 program.

4 Q. Okay. So -- and the RIAA was assisting you in both,
5 correct, by you meaning your company and the other copyright
6 owners?

7 A. I think the notices actually came from RIAA after the
8 information was generated by --

9 Q. So during this --

12:15:54 10 THE COURT: Wait, let him answer the question.

11 MR. BUCHANAN: Sorry.

12 BY MR. BUCHANAN: (Continuing)

13 Q. So during this five-year period that CAS was in play, in
14 operation, how many notices were sent by MarkMonitor to the
15 five ISPs by the copyright owners like your company?

16 A. I don't think it was a five-year period. I think it might
17 have been a four-year period. But I don't know how many
18 notices were sent.

19 Q. So you don't know -- was it one notice or was it millions?

12:16:27 20 A. It wasn't one notice. That would have been horrific.

21 Q. I'm thinking -- do you know how many?

22 A. I don't, no. I just said I don't know how many.

23 Q. Okay. I was just trying to see. Do you -- did you get
24 any data from the ISPs that came through the RIAA or
25 MarkMonitor that would show you how many notices were sent out?

1 A. I am sure RIAA received data. I don't recall the numbers
2 of notices that were sent during the course of this program.

3 Q. And you haven't -- and I think you said you don't know if
4 they ever terminated anyone pursuant to the notices that you
5 sent, however many they were?

6 A. I don't know.

7 Q. Okay. And you haven't sued -- that is, when I say "you,"
8 I apologize, I don't mean you personally, but your company and
9 the other recording companies or music publishing companies, if
10 you are aware of them -- none of them have sued Verizon,
11 Comcast, AT&T, Time Warner, or Cablevision with regard to any
12 of those notices that were sent to the works in suit in this
13 case during that five-year period?

14 MR. OPPENHEIM: Objection, vague and ambiguous. I
15 don't understand what he is talking about inside of CAS,
16 outside of CAS.

17 THE COURT: Overruled. I am going to allow it. If
18 he knows who has been sued and who hasn't, he can answer that
19 question.

20 THE WITNESS: I apologize, Your Honor. That was a
21 long question. We have not sued Verizon, Comcast, Cablevision.
22 What was the other company you mentioned?

23 BY MR. BUCHANAN: (Continuing)

24 Q. Time Warner.

25 A. We have not sued those -- we have not sued those

1 companies.

2 Q. I may have asked this. I apologize if I did. But I
3 thought you testified that as part of the CAS, information
4 would be gathered by the ISPs and shared, you know, with RIAA
5 and your company and the other companies that were copyright
6 owners that were part of CAS.

7 A. I think -- I think some information was shared, yeah.

8 Q. Like a lot of data would be gathered and shared?

9 A. I think some data would be gathered and shared.

12:18:37 10 Q. Did you review any of the data?

11 A. I did not.

12 Q. Do you know anyone in your company that reviewed it?

13 A. I believe that it was looked at at the RIAA level.

14 Q. Okay. Do you know what the value -- I think you testified
15 about Vivendi, the parent company.

16 A. What's the question?

17 Q. Is Vivendi the parent company?

18 A. Vivendi is the ultimate parent company.

19 Q. And what is the value of Vivendi?

12:19:25 20 A. I don't know.

21 Q. Okay. If I showed you a report by, say, JPMorgan with a
22 number, would that -- would you be able to look at that and
23 determine whether that was close to being accurate?

24 A. No.

25 Q. So you have no idea?

1 A. It's a publicly traded company. I assume its value is
2 known.

3 Q. Okay. What about UMG, what is the value of your company?

4 A. We are not a publicly traded company, so I don't know its
5 value.

6 Q. Okay. What are your -- what are your annual revenues?

7 A. I don't know.

8 Q. You have no idea? Okay.

9 A. I am not in the finance department. I just don't know.

12:20:13 10 Q. So you mentioned that you terminated CAS or CAS was
11 terminated. But it was -- in your view, it was just an
12 educational program; is that right?

13 A. I mean, it was a program -- it was a cooperative program
14 with a large educational component to evaluate consumer
15 behavior and to evaluate the methods that were employed in CAS.

16 Q. So -- well, you said to evaluate the behavior. How was
17 that evaluation documented?

18 A. I think CCI, you know, generated some information about
19 behavior across the systems of the CAS participants.

12:21:07 20 Q. Okay. And what was -- what was the data or the
21 information that they generated? Did you see it?

22 A. Over the years, I think I did see it from time to time.
23 My takeaway was using those methods was not as effective as
24 just relying on ISPs to respond to our notices as they are
25 required to under the law.

1 Q. But that's -- with CAS you were sending notices, you know,
2 thousands of notices, you know, by all the companies, and they
3 were supposed to respond, right?

4 A. They were supposed to do what the CAS program outlined for
5 them to do.

6 Q. But they still had to comply with the DMCA, right?

7 A. Well, if they wanted the safe harbor, they would need to
8 comply with the DMCA. They also needed just to comply with the
9 obligation not to infringe our content.

12:21:56 10 Q. Right. Well, that in the first instance was their
11 subscribers, and that's why you would send them the notices,
12 right?

13 A. Well, once the ISP like Cox is notified that its
14 subscribers are infringing, and since they have the ability to
15 control it, they make the money from it, they need to do
16 something. That's the whole reason why we're here.

17 Q. Okay. On CAS, in terms of -- you had this system, CAS,
18 but I think you have even talked about that the DMCA was beyond
19 that.

12:22:27 20 And so, for all those ISPs, even if they complied
21 with CAS, you could still sue them if they weren't terminating
22 people for infringement?

23 A. I'm not understanding the question. If they complied --

24 Q. CAS was --

25 A. Okay. CAS was CAS, and we wanted them to apply with CAS.

1 And we wanted them to understand what was coming out of CAS.
 2 And was there an effective way of dealing with consumers,
 3 educating consumers, engaging in mitigation, engaging in
 4 throttling, did that work, what did that do?

5 Q. Okay. I am asking you aside from CAS, okay -- and I think
 6 you testified to this -- that these ISPs that were part of CAS
 7 still had to comply with the law? In other words, you could
 8 still sue them for copyright infringement, correct?

9 A. Well, those are two different things. Do they still have
 10 to comply with the law? Of course they have to comply with the
 11 law.

12 Q. And that meant --

13 A. You have the music publishers that might be noticing. All
 14 CAS was doing was saying, for these six notices, in some cases
 15 they implemented it as five notices, this is what you have to
 16 do so we can look at that.

17 But if a user is getting a hundred notices, well,
 18 yeah, they are in a different bucket.

19 Q. Okay. How many got a hundred?

12:23:48 20 A. I don't know. How many where got a hundred? In Cox, my
 21 understanding --

22 Q. Well -- excuse me, sir.

23 THE COURT: Hold on. Hold on. Wait for the next
 24 question.

25 He said, I don't know. What is your next question?

1 BY MR. BUCHANAN: (Continuing)

2 Q. All right. But then he said, I don't know which -- who I
3 am talking about.

4 A. Yeah, I said I don't know who you are talking about.

5 Q. Okay. I'm talking about -- I thought I was clear, but
6 maybe I wasn't. I was talking not about Cox, but about those
7 members of CAS, those ISPs that were members of CAS.

8 And you pointed out several times that Cox is not
9 part of CAS, right?

12:24:18 10 A. Cox is not part of CAS.

11 Q. So what I want you to tell me is how many subscribers of
12 the members of CAS received over a hundred infringement notices
13 from the copyright owners that were part of CAS?

14 A. I don't know.

15 Q. How many received over 50?

16 A. I don't know.

17 Q. How many received just one?

18 A. I don't -- I don't know. I imagine there was some that
19 received just one.

12:24:44 20 Q. All right. And in making determinations whether to
21 terminate somebody, you would distinguish a business, say, like
22 a hospital, from a residence, would you not?

23 A. I have never thought about it.

24 Q. Well, let me -- you know, since you -- well, let me ask
25 you. Say a hospital got three notices over three months.

1 Would you terminate the hospital?

2 A. I mean, is it the --

3 THE COURT: I'm sorry, I'm sorry. Lay a foundation
4 as to how he would know that a hospital got a notice in his
5 position before you ask that next question.

6 BY MR. BUCHANAN: (Continuing)

7 Q. Okay. I mean, you -- do you know that there is both
8 residential subscribers and business subscribers?

9 A. I imagine an ISP has different types of subscribers.

12:25:41 10 Q. And what I'm asking you is: Do you -- in terms of how
11 many notices to -- before you would terminate, if there is a
12 distinction from your standpoint between a residence and, say,
13 a business, like a hospital?

14 A. Again, we don't want anybody terminated. What we want is
15 Cox to work with its subscribers to stop the infringement.

16 Q. Okay.

17 A. When you say generically a hospital, is it the hospital's
18 public WiFi? Is it the -- like, I don't know. Cox should be
19 in the position, once they are notified, hey, there's a
12:26:15 20 business --

21 MR. BUCHANAN: Your Honor, I would --

22 THE COURT: No.

23 MR. BUCHANAN: He's not --

24 THE COURT: He does not know the answer. You're
25 asking him what I -- what the -- Cox or an ISP knows and what

1 they should do and he doesn't know. And he has told you he
2 doesn't know. So let's move on.

3 MR. BUCHANAN: Okay.

4 BY MR. BUCHANAN: (Continuing)

5 Q. So what about with regard to a residential? I think
6 you've said three and maybe more. I wasn't sure exactly what
7 you said.

8 But does it matter, for example, if they got three
9 notices in a week and it was for the same song and there was
10 some kid that was 12 years old that did it?

11 A. I think --

12 MR. OPPENHEIM: We --

13 THE COURT: Yeah, I'm going to allow the question.

14 A. I think in your hypothetical, if Cox knows that it's one
15 kid getting three notices over the period of one week, it
16 should be able to work with that subscriber to figure out how
17 to stop that.

18 MR. BUCHANAN: All right. No further questions,
19 Your Honor.

12:27:37 20 THE COURT: All right, thank you. Redirect.

21 MR. OPPENHEIM: I think it's a good time for lunch,
22 Your Honor. We have no further questions.

23 THE COURT: Well, we're going to keep going for about
24 another --

25 MR. OPPENHEIM: All right.

1 THE COURT: -- for a little while longer. So we'll
2 break closer to 1:00.

3 MR. OPPENHEIM: My apologies.

4 THE COURT: You have no redirect?

5 MR. OPPENHEIM: We'll pass the witness, Your Honor,
6 or the witness is excused.

7 THE COURT: All right. May Mr. McMullan be excused?

8 MR. OPPENHEIM: Yes.

9 THE COURT: All right. Mr. McMullan, thank you, sir.

12:27:56 10 You're excused at this time. Please do not discuss the
11 testimony you've given during the trial here with anyone until
12 our trial is over. All right?

13 THE WITNESS: Yes, Your Honor.

14 THE COURT: All right. Have a good day.

15 THE WITNESS: You too.

16 NOTE: The witness stood down.

17 MR. OPPENHEIM: Apologies for assuming lunch was at
18 12:30, Your Honor.

19 THE COURT: Next witness.

12:28:14 20 MR. OPPENHEIM: We will call Steven Marks, Your
21 Honor.

22 NOTE: The witness is sworn.

23 THE COURT: All right. Good afternoon, sir.

24 Mr. Gould, please proceed.

25 MR. GOULD: Thank you, Your Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
: :
SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
: :
-vs- : Case No. 1:18-cv-950
: :
COX COMMUNICATIONS, INC., et al., :
Defendants. :
: :
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VOLUME 2 (P.M. Portion)

TRIAL TRANSCRIPT

December 3, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 getting an ambulance for a life-threatening, you know,
2 situation. So that was still allowed.

3 Q. Just to be clear, was termination required under CAS?

4 A. Termination was not required under CAS.

5 Q. Why not?

6 A. Well, we very much wanted it, but it was just not possible
7 to get that in the negotiation. The ISPs that we were
8 negotiating with wouldn't agree to that as part of the system.

9 Q. Why would you agree to a graduated response program that
10 didn't include termination?

11 A. We didn't have a lot of alternatives is the truth. That's
12 one thing. You know, we, we needed the cooperation of the ISPs
13 to try to address the problem. But second and, you know, maybe
14 really more importantly is that the agreement itself, we were
15 getting a lot of other things in the agreement. So, of course,
16 the specifics of the notice program were important, but things
17 like the creation of CCI that I mentioned earlier, where we
18 were -- you know, that organization on behalf of both the music
19 industry and the ISPs were talking about the seriousness of the
20 problem, how people could avoid infringing by securing their
21 wireless, so it was educating people in that way, and putting
22 together programs.

23 I mean, CCI, for example, put together a curriculum
24 for elementary and middle schoolers, which was something that
25 was really important, because a lot of the people who were

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al., :
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VOLUME 3 (A.M. Portion)

TRIAL TRANSCRIPT

December 4, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 A. No, there is not.

2 Q. And why is that?

3 A. Well, the communication for any of these computers -- any
4 of the peers is between the peers, and some of these
5 peer-to-peer systems use a tracker, so if you were to put a
6 test tracker up with the right monitoring stuff, you could see
7 the transactions maybe that were going to that tracker, but
8 you still couldn't see everything else that was going on in
9 the network.

10 Q. So, so there's nowhere you can go to see the number of
11 users on the network overall; is that correct?

12 A. That's correct. By design, these systems are extremely
13 robust and these machines talk directly to each other without
14 central control.

15 Q. What about if I went to the Cox user that downloaded and
16 is then distributing files to others? Could I uncover the
17 number of times that Cox user distributed files from a review?

18 A. Not in any practical way, no.

19 Q. What do you mean by that?

20 A. Well, if you just went to a user's computer and inspected
21 it forensically, you might have some evidence of their
22 activity, but you would not have evidence of all of their
23 activity.

24 Q. Let me ask you --

25 A. And you would, you would have to actually do a forensic

1 examination of that machine to get any information.

2 Q. Let me ask it to you this way: Are logs kept with --
3 from the software otherwise of the number of times that user
4 distributes a file?

5 A. No.

6 Q. Okay. Can you explain a little bit about the other three
7 peer-to-peer networks that were identified in MarkMonitor's
8 infringement notices to Cox?

9 A. Sure. Can we go on to the next slide?

10 Q. Okay. And so these are the other three? Is that the
11 Ares logo?

12 A. Yes, Ares, Gnutella, and eDonkey.

13 Q. Okay. And I see again the, the file hash value image
14 we're using. Why is that there?

15 A. Again, all of these systems rely on hash to authenticate
16 and identify files. That's a really important technology.
17 That's one of the foundation technologies of these systems.

18 Q. And there's a bunch of icons under file types. What is
19 that meant to convey?

20 A. Again, these networks can be used to distribute any kind
21 of file. Anything that's in an electronic form can be
22 transmitted on BitTorrent, so electronic books, movies, music,
23 if I want to send a video of my dog chasing her tail, any of
24 that can be distributed on the -- using BitTorrent across the
25 internet to others.

1 specific peer, that's essentially the commencement of a
2 download process, and so certain information is exchanged back
3 and forth between the MarkMonitor system and a peer at that
4 time, and the purpose of this exchange of information is to
5 verify that the peer is online, actively running a BitTorrent
6 client or one of the other clients that we've discussed,
7 actively responding to requests for a particular hash value
8 that has been verified to have known content that is some of
9 plaintiffs' copyrighted works.

10 And then, you know, because this is, is using the
11 hash which is what the BitTorrent system itself uses, at that
12 point, instead of downloading content, it breaks off the
13 connection because there's no need to -- the peer has already
14 said, yes, I have the hash, I have these pieces of the hash.
15 So at that point, the system breaks the connection and creates
16 an evidentiary record that's -- that records that exchange of
17 communication.

18 Q. What -- it says: Hash match (no need to re-download).

19 Why is that on your slide?

20 A. Just to remind me to point out, A, that it doesn't
21 actually download the file, it doesn't create another copy of
22 the file, but it has used that hash, that is, the fingerprint
23 of the file, just as any BitTorrent client would, to say this
24 is the file.

25 Yes, I've -- and the peer is responding, yes, I have

1 that file or I have pieces of that file.

2 Q. And when you say re-download it, is that because in the
3 -- one step earlier in the verification module, MarkMonitor
4 already downloaded a file that has that hash?

5 A. That's correct, yes. It's a known hash here, so there's
6 no need to download it.

7 THE COURT: Can we stop here for our morning break?
8 Does that work?

9 MR. ZEBRAK: Of course, Your Honor.

10 THE COURT: All right.

11 MR. ZEBRAK: We don't have that much more.

12 THE COURT: Okay. Then let's take 15 minutes.
13 We'll come back and continue the testimony. Thank you.
14 You're excused.

15 NOTE: At this point, the jury leaves the courtroom;
16 whereupon, the case continues as follows:

17 JURY OUT

18 THE COURT: All right. Anything before we break?

19 MR. ZEBRAK: No, Your Honor.

20 THE COURT: Okay. All right. Let's take 15 minutes
21 then. We're in recess.

22 NOTE: At this point, a recess is taken; at the
23 conclusion of which the case continues in the absence of the
24 jury as follows:

25 JURY OUT

1 time. And so it provides some rich information about what
2 happened during that exchange.

3 And then the content information is important
4 because that's where it passes back that BitTorrent -- bit
5 field or the size, the amount of the file that that particular
6 peer has, and that information is used later in the
7 processing, so I wanted to just point to that's where that
8 comes from.

9 Q. And are hash values involved in this size or bit field
10 data at all?

11 A. Not in the size data itself, but it is the hash of a
12 particular requested file or requested torrent, which is a
13 collection of files that the bit field pertains to. And the
14 hash is recorded in the evidence logs as well.

15 Q. And Cox's counsel in their opening statement made
16 reference to the word "spying." Do you recall that?

17 A. I think I heard that word a couple of times in their
18 opening presentation, yeah.

19 Q. In this process when MarkMonitor goes to a peer-to-peer
20 network to request a file -- well, first of all, do you have
21 an understanding of whether that process involves spying?

22 A. No. The MarkMonitor software acts like just any other
23 peer with two exceptions. It creates a record of what it's
24 done, and it doesn't typically download -- at least in the use
25 that we see in this case, it doesn't download the file.

1 every client -- or every peer on the network that could be
2 exchanging information that they weren't entitled to exchange.

3 Q. And why -- I'm sorry.

4 A. It's just, it's just the sheer size of the network. You
5 know, again, you're talking about a network that has hundreds
6 of millions of users, and at any point in time, there's 15,
7 20, 30 million of them active. It's just not feasible to have
8 one person monitor that much traffic. Technically, it's a
9 problem.

10 Q. In a moment -- well, could you remind the jury about your
11 overall conclusions about the accuracy and reliability of the
12 MarkMonitor system?

13 A. Yes. I find that the system accurately detects peers
14 that are copying and distributing the plaintiffs' copyright
15 works, and I find that it prepares and sends accurate notices
16 about that infringement activity that it detects.

17 Q. And Cox's counsel in Cox's opening statement said that
18 there's, I believe, no proof that plaintiffs -- that a Cox
19 customer actually possessed a copy of plaintiffs' works. Do
20 you have a reaction to that?

21 A. I completely disagree.

22 Q. And could you explain why?

23 A. The evidence that I saw was, first of all, voluminous in
24 nature. The evidence -- I examined about 175,000 evidence
25 cases. Every one of those cases included hash information for

1 the file that the peer itself had reported that it was making
2 available to distribute, and these peers, recall, are on this
3 peer-to-peer file-sharing network.

4 This is not just some random search of people's
5 computers, but it's actual activity that the peer running the
6 client software is responding to a request for a file with
7 information about the file it has to share.

8 And the, the information I looked at was very
9 internally consistent. For instance, I could take a hash from
10 a notice and trace it all the way back to a hash in a record
11 that MarkMonitor had about when that information was collected
12 from that peer, and I could match up other pieces of the
13 notice. You have the time matches; you have the title
14 matches.

15 I could also use the hash to match it to that copy
16 of the infringing work that was on the disc and play the music
17 for myself and say, yes, you know, this is, this is this song.
18 I can go out to iTunes and verify that.

19 And when I looked at the whole set of the evidence I
20 got, it was logically consistent from end to end, from song to
21 detection to notice, and so based on that, you know, I'm very
22 confident that these -- this is reliable information and
23 accurately documents what those clients were doing.

24 Q. So Cox's counsel in Cox's opening statement said that
25 there's no proof that the files that MarkMonitor identified in

1 down.

2 MR. ZEBRAK: Sure. Let me --

3 THE COURT: Thank you. Go ahead.

4 BY MR. ZEBRAK:

5 Q. Well, let me rephrase the question as Your Honor
6 suggested.

7 When MarkMonitor identifies a peer, a Cox subscriber
8 on one of these file sharing networks with a file on their
9 computer, is MarkMonitor able to identify whether that's a
10 copy of a file that the peer obtained lawfully?

11 MR. BRODY: Objection, Your Honor.

12 MR. ZEBRAK: I could say it differently, Your Honor.

13 THE COURT: Yeah. Sustained.

14 MR. ZEBRAK: Sure.

15 BY MR. ZEBRAK:

16 Q. When MarkMonitor identifies a peer, a Cox subscriber on a
17 network with a file, can it tell if the peer obtained it from
18 another peer on the network as opposed to a legitimate source
19 like iTunes or Amazon or something like that?

20 A. Well, in the evidence I examined, it was often the case
21 that the -- I mean, in approximately, I think, 15 percent of
22 the records, the peer was still collecting the evidence. So
23 they only had part of the file, you know, 90 percent but not
24 100 percent. So that certainly tells me that in those
25 instances, that peer was not getting it off of Amazon.

1 And with respect to the, you know, the implication
2 that all of these peers might have gotten something legally
3 and then gone out there and created torrents for it
4 presumably -- because if they got it legally, they wouldn't
5 have a torrent -- it's kind of like saying you walk into a bar
6 and there's a guy there with a beer in his hand. Where did he
7 get it? Well, he probably bought it in the bar.

8 Is it possible that one of those guys or two of
9 those guys were the ones who first created a torrent? As a
10 hypothetical, that could be possible, but it's improbable.

11 MR. BRODY: Your Honor, I object. That's
12 speculation.

13 THE COURT: Hold on, hold on. No, overruled. I'm
14 going to allow her to use the example. Go ahead.

15 THE WITNESS: I'm just saying it would be extremely
16 improbable to think that that could happen on such a massive
17 scale, that somehow all of these people bought something and
18 then created torrents for it so they could give it away to
19 total strangers en masse. That's just a nonsensical
20 interpretation of the evidence.

21 BY MR. ZEBRAK:

22 Q. And even -- let's take -- call that a nonsensical
23 interpretation of the evidence, that somebody would -- well,
24 let me not --

25 A. And I didn't mean any disrespect by that, but it just --

1 it flies in the face of reason.

2 Q. Sure. No, I understand.

3 Let's take that hypothetical scenario where it was
4 something that someone obtained from, let's say, iTunes and,
5 you know, was on the network with it. What, what would happen
6 for anyone else on the network who wanted that file from that
7 person?

8 A. Well, they would start downloading it if they opened the
9 torrent that was associated with the file, or at least at some
10 point, they would begin downloading that content. Because
11 once the torrent is out there, that makes the file able to be
12 downloaded by other peers.

13 Q. And final, final question before we quickly cover the
14 CATS system: Do you recall during Cox's counsel's opening
15 statement an assertion was made that there's no proof that
16 Cox's customers actually provided copies of the files to
17 others that they were reported for -- in these notices to Cox?
18 Do you recall that?

19 A. I do recall that.

20 Q. And do you have a reaction to that?

21 A. I disagree with that statement, again, based on the
22 evidence that I've reviewed and my knowledge of how the
23 BitTorrent and Ares, Gnutella, and eDonkey software works, and
24 the fact that you cannot accidentally share a file via
25 BitTorrent, and it's extremely unlikely to do so, in my

1 opinion, via the other three products.

2 I just don't think that, that there is any lack of
3 proof that the Cox clients were participating in these file
4 sharing networks and were providing content that based on its
5 hash identification is plaintiffs' content.

6 Q. Sure. And for those Cox subscribers that were reported
7 in these notices that hadn't yet obtained 100 percent of the
8 file, I think you said there were about 15 percent of them
9 that had somewhere between 90 to 100 percent of the file; is
10 that correct?

11 A. Yes.

12 Q. What were -- what's your understanding, if any, of what
13 those peers were engaged in at that time of detection?

14 A. Well, I'm sure that they were probably distributing as
15 well as copying, but for at least some of them, when I went
16 through the evidence records, I could see that over time, the
17 amount of the file that they had moved from less than 100
18 percent when it was detected on one detection to later moving
19 to 100 percent of the file. So I know for a fact that they
20 were downloading copies.

21 Q. Sure.

22 A. And because of the tit-for-tat way that BitTorrent works,
23 it's almost impossible to conceive that they were not also
24 uploading those copies to others.

25 Q. What do you mean by the tit-for-tat way of BitTorrent?

1 A. BitTorrent and the other three protocols that we
2 discussed earlier are all designed to prioritize exchanges
3 with peers that are, are downloading to you. So if I have ten
4 peers asking me for content, I'm going to give content -- I'm
5 going to download from and give content to those four peers or
6 three peers that are giving me the best content exchange
7 possible. So I'm uploading as well as downloading.

8 And if you're not also uploading, the tit-for-tat
9 system kind of puts you at the back of the line, and although
10 it's still possible to get content if you're not uploading,
11 it's not the way these systems are designed to work, it's not
12 the way the protocols are designed to work. All of them have
13 built into them this notion of exchange, that it's two peers
14 exchanging content.

15 Q. Thank you. I'd like to turn your attention now to the
16 Cox CATS system, okay?

17 A. Okay.

18 Q. You said you had an opportunity to review the CATS system
19 in your work in this case?

20 A. Yes, I have.

21 Q. Okay. And at a high level, what did your review involve?

22 A. It involved, again, looking at the source code of the Cox
23 CATS system, some of the configuration data related to how
24 that system was set up to operate. I looked at copies of some
25 of the policies that the CATS system was intended to implement

UNITED STATES DISTRICT COURT
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VOLUME 3 (P.M. Portion)

TRIAL TRANSCRIPT

December 4, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 computer --

2 If we could get slide 18 up. Okay. There we go.

3 When MarkMonitor connects to the peer computer, it
4 collects information off of the computer about the peer-to-peer
5 file that the peer has, right?

6 A. Right.

7 Q. The Cox subscriber?

8 A. Correct.

9 Q. And one thing you say here is that: Hash match (no need
15:00:09 10 to redownload.)

11 And what you meant by that was that MarkMonitor looks
12 to see what the hash is on the Cox subscriber's computer, it
13 downloads the hash, but it does not download any of the file,
14 right? Any of the payload, if you will, the content, the
15 music?

16 A. There were a few exceptions in the evidence I saw where
17 the connection had not been broken in time and some small
18 portion of the song was downloaded.

19 But generally the design of this system for this
15:00:49 20 particular scanning was not to download the files, that's
21 correct. To rely on the hash.

22 Q. And, in fact, both you and our expert, Mr. --

23 Dr. Feamster, you guys looked at all 175,000 evidence packages,
24 and I think there are 143 or something, 144, where there's a
25 little bit of data downloaded.

1 But all the rest of them have nothing downloaded from
2 the peer computer, no content?

3 A. That's correct.

4 Q. And I think you even told me that the MarkMonitor software
5 is written so that it assures that the MarkMonitor computer
6 will break off the connection with the peer before any content
7 is downloaded?

8 A. Well, it breaks off the connection very quickly, which
9 typically would result in that, yes.

15:01:39 10 Q. Well, but the -- I mean, it -- the -- it's designed to
11 avoid downloading content?

12 A. With the particular variant of the software that I was
13 looking at that was what was used in this case, yes, it
14 attempts to break connection very quickly.

15 Q. So if anybody said -- if I were to say to you that I
16 believe that MarkMonitor actually downloaded pieces of the
17 files on the peer computers, you would tell me I was wrong,
18 wouldn't you?

19 A. In what context?

15:02:16 20 Q. This context.

21 A. So specifically in the software as it was configured to
22 run for the RIAA in this litigation?

23 Q. Exactly.

24 A. And can you repeat back your question again? I just want
25 to make sure I was --

1 Q. Sure. If I told you or anybody told you that MarkMonitor
2 was downloading the content of the files from the peer
3 computers, not just the hash and not just, you know, the other
4 data associated with the file, but the file itself, if somebody
5 said, MarkMonitor was doing that, downloading pieces of the
6 file, you would tell them they were wrong, right?

7 A. With the exception of that little tiny fraction where the
8 connection is not broken in time that we just spoke of, they
9 would be mistaken, yes.

15:03:08 10 Q. Well, it's a little stronger than that. You looked at
11 170-odd thousand files, and none of them had any downloaded
12 content, or 143 or '4 had some, right?

13 A. There was no downloaded content present in the evidence
14 packages that I examined. I don't recall if I checked every
15 single record to see if there had been any and they simply
16 weren't a part of the package.

17 But my recollection is that aside from 143 files,
18 there was no downloaded content.

19 Q. Could we have -- one of the things you looked at in
15:03:46 20 preparing your report was a document that MarkMonitor prepared
21 for RIAA to explain how they were going to perform this work,
22 and they did it in -- I think it was April of 2012. Do you
23 recall that?

24 A. I recall looking at several documents they prepared for
25 RIAA. I'd be happy to take a look at the one you're talking

UNITED STATES DISTRICT COURT
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VOLUME 4 (A.M. Portion)

TRIAL TRANSCRIPT

December 5, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 So on this slide, the claim period is denoted or
2 described by the yellow bar at the top. It starts February 1,
3 2013, and ends November 26, 2014.

4 And the checkmark means that all of the 10,017 works
5 in suit did correspond to a notice during this claims period.

6 Q. Was the claim period the same claim period for every
7 single plaintiff group in this case?

8 A. No. There is a note below the bars for the years that --
9 for the Sony ATM/EMI claims, the start of the claim period was
10 August 1, 2013, rather than February 1, 2013. But that period
11 was the same, the ending date of the claims period for Sony
12 ATM/EMI was the same as for all the others.

13 Q. And, Dr. McCabe, would you briefly walk the jury through
14 the remaining three checked boxes on this slide.

15 A. Yes. So the second is that -- this issue of the third or
16 later notice for a particular subscriber. So that was
17 satisfied for all of the 10,017 works.

18 That the infringing file in the notice contains the
19 work in suit.

12:35:11 20 And that there is a copy of the work on a hard drive
21 created by MarkMonitor.

22 So all of these -- the four requirements are
23 satisfied. And the term I'm using is that means those works in
24 suit were qualified.

25 Q. Dr. McCabe, what data sources did you use for your

1 that lists the notices and the information contained in each
2 notice. So all that -- these are all data files that I had.

3 So there is a file for notices from MarkMonitor.
4 There is a file for the downloads that MarkMonitor downloaded.
5 And there is a file from MarkMonitor about the Audible Magic
6 procedure or connections to go from hashes to works.

7 Q. And what is depicted with respect to Cox in terms of data
8 from Cox that you considered within your analysis?

9 A. So Cox also provided three data sets. The first one
10 listed there is subscriber identification. So the Cox CATS
11 system has identifiers for subscribers. It was necessary to
12 have that information to be able to perform my analysis.

13 So it's the file itself connected subscriber IDs with
14 notices.

15 The second file is what I have called the ticket
16 file. It's the large file that contains the tickets that Cox
17 recorded in their CATS system.

18 And the third is a file that identifies Cox
19 subscribers as -- I used it to distinguish residential from
20 business subscribers.

21 Q. And when you say the third file, was that the billing
22 information file?

23 A. I am sorry, the billing information file, yes.

24 Q. And, finally, to the right of plaintiffs, there is an
25 Exhibit A and B. What are those two files?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
: :
-vs- : Case No. 1:18-cv-950
: :
COX COMMUNICATIONS, INC., et al., :
Defendants. :
: :
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VOLUME 5 (A.M. Portion)

TRIAL TRANSCRIPT

December 6, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 business -- strike that.

2 Your Honor, I would move to strike that last answer.

3 THE COURT: Overruled. It will be allowed.

4 MR. OPPENHEIM: Do you know --

5 THE COURT: You asked her a hypothetical, and she
6 answered.

7 MR. OPPENHEIM: Okay.

8 BY MR. OPPENHEIM: (Continuing)

9 Q. Are you aware of whether or not there were any critical
10 hospitals provided high speed Internet service in this case
11 other than public WiFi, and are you aware whether that
12 information was ever produced to the plaintiffs?

13 MR. ELKIN: Objection.

14 THE COURT: Sustained. Okay. We're not going to get
15 into discovery production issues with -- let's move along.

16 MR. OPPENHEIM: Okay.

17 BY MR. OPPENHEIM: (Continuing)

18 Q. So you believe there are circumstances under which a Cox
19 Business customer could receive 50 notices and you would still
20 attempt to be -- still be attempting to educate them; is that
21 correct?

22 A. I can't answer that question. I don't know what the
23 circumstances are. I mean, if you have a hospital, you are
24 talking about hundreds of users.

25 Q. What about if there were hundreds of notices?

1 A. Again, I think you're going to work with that customer.
 2 But, again, you -- I don't know -- we have customers that range
 3 from the smallest, you know, coffee shop, retail store, up into
 4 the largest hospitals, government buildings. I mean --

5 Q. Fair enough. What if you had an apartment building that
 6 had hundreds of notices. Do you think you would still be
 7 trying to educate them?

8 A. You know, that's a hypothetical I can't answer. I don't
 9 know what all the circumstances are.

12:06:56 10 Q. What about --

11 A. And that -- and that could -- I don't know if that's
 12 residential or business. I mean, there's an infinite number of
 13 variables. But we would certainly work to try to stop any kind
 14 of that behavior.

15 Q. What about a fraternity that was the subject of dozens and
 16 dozens of notices? Are you still trying to educate the
 17 fraternity?

18 A. Well, I don't know. At what point? I mean, is a
 19 fraternity -- are you talking about as a business account or a
 12:07:22 20 residential account? So --

21 Q. So to be clear, Ms. Trickey, the AUP for business
 22 customers says zero infringement, zero tolerance, correct?

23 A. Well, the documents at that point in time -- no, actually
 24 it -- which document are we referring to again, the AUP?

25 Q. Acceptable Use Policy.

1 A. No, we had a good relationship with RIAA.

2 Q. You thought that Cox had a good relationship with RIAA,
3 right?

4 A. Yes.

5 Q. So just to be clear, because I guess I wasn't, there are
6 basically two kinds of blacklist, one where the notices come in
7 but don't get forwarded, and one where the notices never get
8 in; is that accurate?

9 A. Right. And then there's the third where the notices do
10 come in and get forwarded.

11 Q. Earlier we were talking about commercial customers. And
12 you indicated the situation where a hospital might have -- be a
13 Cox Business customer, correct?

14 A. Correct.

15 Q. That hospital, as a business, may have Internet for, let's
16 say, its doctors and nurses, correct, its staff?

17 A. Yeah, and patients, and family members, and workers.

18 Q. Okay. But that hospital may also have a public WiFi
19 system that is different than what the doctors use, right?

12:40:53 20 A. Yes, they could.

21 Q. And in fact, most hospitals these days, modern hospitals
22 do have a public WiFi system, right?

23 A. That's probably the case. I would think so.

24 Q. The cardiac surgeons working in the hospital don't have to
25 go onto the public WiFi system, do they?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al., :
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Defendants. :
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VOLUME 5 (P.M. Portion)

TRIAL TRANSCRIPT

December 6, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 been designed to protect our service, our subscribers, and the
2 internet community from inappropriate, illegal, or otherwise
3 objectionable activities.

4 Q. And what's your understanding as to the purpose of that
5 statement?

6 A. Well, that's to -- you know, there are many parties in the
7 internet ecosystem, and so this was to put customers on notice
8 that the, what we have said in the AUP is designed to protect,
9 you know, us and our network as well as them and the internet
10 community from activities that they shouldn't be doing.

14:22:00

11 Q. Okay. If you skip the next sentence, could you read the
12 following sentence that begins with: Violation of any term?

13 A. Violation of any term of this AUP may result in the
14 immediate suspension or termination of either your access to
15 the Service and/or your Cox account.

16 Q. Okay. What is your understanding as to the purpose of
17 that statement?

18 A. That's to put customers on notice that if they misuse the
19 service, that they could lose the privilege of the service.

14:22:35

20 Q. And does Cox believe that this statement obligates Cox to
21 suspend or terminate a subscriber's access to the internet if
22 they violate any term of the AUP?

23 A. No, I think the word "may" is in there because the
24 circumstances will, will vary, and so this is to put them on
25 notice that you, you could lose your service.

1 Q. So in circumstances where a customer violates the AUP, do
2 you have an understanding as to what steps Cox will take?

3 A. Yes.

4 Q. And what are they?

5 A. So if they violate the AUP and we become aware of it,
6 typically the, the goal is to reach out and to educate and to
7 modify behavior, to coach, to help them try to figure out
8 what's going on, how they can, you know, fix the problem, close
9 the open WiFi. I mean, there's a lot of things that we walk
10 through. So we try to educate and get them to, you know,
11 change behavior.

12 Q. Okay. On direct, I think there were questions that were
13 put to you as to the AUP related to a, I think, a zero
14 tolerance policy. How did you view the AUP relative to any
15 notion of zero tolerance?

16 A. Well, the -- you want to make sure your subscribers
17 understand in strong language, you know, what they can and
18 can't do using the service, but I did not believe that the AUP
19 required a zero tolerance because there are a variety of
20 circumstances that could be at play.

21 Q. Well, wouldn't it have been easier if Cox just terminated
22 these subscribers if there was a violation of the AUP?

23 A. Well, not really because, you know, internet access is a
24 very important part of our society, and people need it to, you
25 know, work, to shop, to do all kinds of things online. Now we

1 A. Well, let's see. It starts out with your privacy rights.
2 There's an annual privacy notice that's actually included, and
3 then --

4 Q. I'm sorry to interrupt you. That was a bad question.

5 A. Oh.

6 Q. Let me direct you to the first page of the exhibit. This
7 Cox Business policies, do you see the effective date of when
8 this particular policy went into effect?

9 A. It says it was updated November 18, 2011.

14:28:00 10 Q. And then let me direct your attention to the fourth page
11 of this exhibit. In the middle of the page, do you see any
12 other new effective policy AUP for the business for Cox?

13 A. Yes. There's a Cox Business Acceptable Use Policy. It
14 says it was updated October 1, 2012.

15 Q. Do you know whether or not these were the Cox Business
16 AUPs that were in effect during the 2013 and 2014 time frame?

17 A. I think so, yes. I don't think there was a later business
18 one after this.

19 Q. Does Cox view the business AUP violations differently than
14:28:50 20 residential AUP violations?

21 A. Well, so how we treat the potential violations, we do have
22 different processes.

23 Q. Why is that?

24 A. Well, because business customers are very different from
25 residential customers, and as I stated earlier this morning,

1 business customers range from, you know, a very small business
2 up to very large businesses, but they are businesses, and they
3 are largely reliant on their internet service.

4 You also have many businesses that have users of the
5 internet service who they may not even know who the person
6 actually is, because they could be a doctor's office that
7 offers WiFi, or it could be -- you know, we talked about a
8 hospital. We've got government buildings, you know, police,
9 fire, all kinds of different buildings, and so you don't always
10 know who the actual -- the identity of who the actual users
11 are.

12 Q. Okay. You can take that down, James.

13 I want to turn to a different subject, if I may. Do
14 you know whether there was a particular group at Cox that dealt
15 with copyright infringement claims during 2013 and 2014?

16 A. Yes. That was the customer safety team.

17 Q. And what was the customer safety team's role and
18 responsibility for this?

19 A. So that, that team would ingest the complaints that came
20 in from the copyright holders into our -- what we called our
21 CATS system, the Cox abuse tracking system. It would sign a
22 ticket, and they were responsible for carrying out the
23 graduated response.

24 Q. Do you know what the focus of the customer safety team was
25 in dealing with customers who were accused of copyright

1 Q. Does Cox provide information in response to a copyright
2 owner that follows that procedure?

3 A. Yes. If we received a subpoena, we would fulfill the
4 subpoena.

5 Q. Do you know whether Cox ever had a practice whereby it
6 would turn a blind eye to copyright infringement of its
7 customers?

8 A. No. I mean, you know, I think that the fact that we were
9 the first ISP to actually create a graduated response process
10 before anybody else to me shows we did not turn a blind eye,
11 and this was a very complex issue with a lot of people in the
12 internet ecosystem that you had to balance, and so, you know,
13 my position is that I felt like this evolved over time
14 according to the needs of, you know, customers, Cox, and the
15 copyright holders.

16 But I do not believe, I mean, the fact that you're
17 first creating a process that nobody else had even done yet to
18 me shows you didn't turn a blind eye. You actually took it
19 seriously. We had a gentleman, Matt Carothers wrote the code
20 for the whole CATS system.

21 MR. ELKIN: No further questions, Your Honor.

22 THE COURT: All right. Thank you.

23 Redirect or cross. You may lead. Thank you.

24 MR. OPPENHEIM: Call it whatever you want, Your
25 Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
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Defendants. :
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VOLUME 6 (A.M. Portion)

TRIAL TRANSCRIPT

December 9, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 THE WITNESS: Good morning.

2 THE COURT: Please proceed.

3 MATTHEW J. FLOTT, called by counsel for the
4 plaintiffs, first being duly sworn, testifies and states:

5 DIRECT EXAMINATION

6 BY MS. NOYOLA:

7 Q. Good morning, sir. Please state your full name for the
8 jury.

9 A. Matthew James Flott.

10:08:19 10 Q. Mr. Flott, where do you work?

11 A. I work at Warner Music Group.

12 Q. What is your position at Warner Music Group?

13 A. I am the executive vice-president and chief financial
14 officer for the Recorded Music Division.

15 Q. Is the Recorded Music Division, that houses the record
16 labels of Warner Music?

17 A. Yes.

18 Q. What are your general responsibilities as executive
19 vice-president and chief financial officer?

10:08:44 20 A. I have the responsibility for managing the overall
21 financial performance for the Recorded Music Division. That
22 includes reporting our actual results, forecasting our
23 performance, budgeting. It also includes responsibility over
24 our deal process. It includes as well comparisons to market
25 trends, our competitors, and generally supporting the Warner

M.J. Flott - Direct

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1 Music senior team in reporting to the Board of Directors and
2 our external reporting.

3 Q. How long have you held this role at Warner Music?

4 A. A little over four, four total years.

5 Q. What is your educational background?

6 A. I have a bachelor of science in accounting.

7 Q. And how long have you worked in the music industry?

8 A. A little over 25 years.

9 Q. How much of that time has been at Warner Music?

10:09:53 10 A. 16.

11 Q. What other roles have you had at Warner Music?

12 A. I first started in 1983 as a staff accountant. When I
13 returned in 2016, I was the CFO for the independent label
14 group.

15 I then moved to be the CFO for our Warner Music Group
16 distribution. I then moved to be the international CFO for
17 Recorded Music. Came in for the first time to the CFO for --
18 over all recorded music. And then I became the chief financial
19 officer for global financial analysis and operations.

10:10:37 20 Q. And then where did you work before you joined Warner
21 Music?

22 A. I joined -- I worked -- just prior to coming back, I
23 worked for Take-Two Interactive in the video game business for
24 three years. I was at BMG Entertainment for four years. I was
25 at Caroline Records for six years. I spent five years at Sony

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1 Video on the movie side of the business. And I did an odd year
2 at Exxon as an analyst on the oil and gas side of the business.
3 Q. All right. Let's turn back to Warner Music Group. Can
4 you tell us a little bit about your company and how it fits in
5 the music industry.

6 A. Sure. Warner Music, within the music business, is
7 considered one of the three global majors. And, you know, we
8 operate like everyone else, trying to find the most talented
9 artists and partnering with them to build their brands and, you
10:11:54 10 know, develop their careers around the globe.

11 Q. I think you said majors. What do you mean by majors?

12 A. Majors are generally, if you look at the size of one's
13 market share, so Universal, Sony, and ourselves, the three of
14 us have market share that would be considered, you know, larger
15 than the other smaller, independent companies.

16 Q. What are some of the record labels in Warner Music Group?

17 A. The three primary labels that we were built off of were
18 Atlantic Records, Warner Brothers Records, now Warner Records,
19 and Elektra Records.

10:12:39 20 We also have a variety of other labels that come
21 underneath each of those labels from Nonesuch, to Roadrunner,
22 to Fueled By Ramen, just to name a few. But there are hundreds
23 of labels that we have around the world.

24 Q. Are any of the plaintiffs in this case Warner Music Group
25 record labels?

1 A. Yes.

2 Q. Did you assist in the preparation of a demonstrative for
3 your testimony today?

4 A. I did.

5 Q. I would like to pass up to the witness a copy of that
6 demonstrative.

7 THE COURT: Any objection to publishing that?

8 MR. BUCHANAN: No objection.

9 THE COURT: All right. Thank you.

10:13:30 10 BY MS. NOYOLA: (Continuing)

11 Q. Mr. Flott, what does this slide show?

12 A. This slide shows six of our labels that are in the suit.

13 Q. May I refer to all six of these entities as the Warner
14 Music plaintiffs?

15 A. Yes.

16 Q. All right. You can take that down, Mr. Duval.

17 Mr. Flott, are you familiar with the Warner Music
18 plaintiff sound recordings at issue in this case?

19 A. I am.

10:14:03 20 Q. I would like to publish PX 1, which has already been
21 received into evidence.

22 MR. BUCHANAN: No objection.

23 MS. NOYOLA: I also have a copy for the witness.

24 BY MS. NOYOLA: (Continuing)

25 Q. Mr. Flott, I would like to direct your attention to

1 page 112, starting at lines 5446 to the very last page.

2 What do these entries show?

3 A. These show the sound recordings that are included as being
4 infringed in this case of the Warner -- our Warner copyrights.

5 Q. And about how many sound recordings of the Warner Music
6 plaintiffs are listed in this exhibit and at issue in this
7 case?

8 A. Approximately 1,300.

9 Q. All right. You can put that to the side.

10:15:14 10 Did you assist in the preparation of a demonstrative
11 medley of some of the works in this case?

12 A. Yes.

13 MS. NOYOLA: Your Honor, with your permission, I'd
14 like to play that medley.

15 NOTE: The audio recording is played.

16 BY MS. NOYOLA: (Continuing)

17 Q. Mr. Flott, I noticed you nodding your head to music there.
18 Are you familiar with the sound recordings that we just played?

19 A. Yeah, I am.

10:17:35 20 Q. And how are you familiar with them?

21 A. Many of them from when I was growing up. You know, one in
22 particular, "Cashmere," was one of the first concerts I ever
23 went to out at the Capital Center. You know, being the
24 youngest of 13 kids, that was, you know, one of the first ones
25 that I could really go to see.

1 So brings back a lot of good memories.

2 Q. And how -- what do these sound recordings represent to
3 Warner Music Group?

4 A. They're some of the most iconic songs in our catalog and,
5 you know, we want to make sure they're protected.

6 Q. Have you listened to any of the infringing music files in
7 this case?

8 A. I have.

9 Q. How many?

10:18:19 10 A. I listened to 100.

11 Q. And how were those 100 selected?

12 A. It was a random statistical sample.

13 Q. And why did you listen to a sample of the infringing music
14 files in this case?

15 A. I wanted to make sure that I familiarized myself with what
16 was being infringed and whether they were in fact our songs.

17 Q. And what did you conclude after listening to those files?

18 A. That they are in fact our songs listed within the exhibit.

19 Q. All right. Let's turn to the revenues generated from
10:18:55 20 Warner Music's -- Warner Music Group's sound recordings.

21 What are the different ways that Warner Music makes
22 money from its sound recordings?

23 A. We will sell our music in various formats to customers.
24 And we will also license music into sound tracks, into
25 commercials, films.

1 We will license them to competitors in some cases to
2 put together compilations and other works.

3 It will also lead to what we call artist services and
4 expanded rights. So those are other ancillary rights that we
5 might have in concert promotion, in merchandise, and some other
6 areas like that.

7 Q. You mentioned formats. What are the different types of
8 formats that Warner Music Group sells with sound recordings?

9 A. Sure. We sell records in a physical format, so that would
10:20:01 10 be either a compact disc or a vinyl record. They may also come
11 in a box set. We sell it in digital formats, downloads, and
12 streaming. We also sell it in mobile formats, ring back tones.

13 Those are the primary formats that we sell music in.

14 Q. What is Warner Music Group's view on paying its artists?

15 A. We see it as fundamental to our business. Our initial
16 relationship is with the artist. We have to build the trust
17 that they know that we're going to help them develop their
18 careers and that they know that they will be -- they will be
19 paid for the sales that we do on their behalf and our behalf.

10:20:56 20 Q. How would you react if someone said that the Warner Music
21 Group record labels are not collection agents for their
22 artists, but that they actually just collect money for
23 themselves?

24 A. I would say they're misinformed and patently wrong.
25 Fundamental to how and why we've been in business for the

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1 decades that we've been in business and, you know, our
2 competitors in some cases longer than that, if we didn't have
3 the trust of our artists that they were going to get paid, then
4 we wouldn't be able to continue to sign and develop and attract
5 artists year in and year out.

6 Q. In your role as executive vice-president and chief
7 financial officer, are you familiar with peer-to-peer piracy?

8 A. I am.

9 Q. Has Warner Music Group been impacted by peer-to-peer
10:22:01 10 piracy?

11 A. We have.

12 Q. What has been that impact?

13 A. It has been -- it's been enormous and significant. In a
14 period of time when music consumption has risen year in and
15 year out, as an industry we've seen revenues decline over that
16 period, over a period of time from its peak to where we are
17 today.

18 Q. What were the consequences of this revenue decline to the
19 music industry as a whole?

10:22:46 20 A. Well, first and foremost, you know, artists were not
21 getting paid. Copyright holders weren't getting paid, as well
22 as union members, as well the musicians working on those
23 records.

24 We, as Warner Music Group, had to rationalize our
25 infrastructure or the labels that we had, and we've had to go

M.J. Flott - Direct

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1 through at different points in time and either close labels
2 down, merge them together.

3 Probably the clearest example I could give you would
4 be two of our kind of founding labels of Atlantic and Elektra
5 being merged together to rationalize their costs simply because
6 of the revenue decline.

7 You know, Elektra is the home of artists like "The
8 Doors" and "The Eagles" and "Anita Baker" and others like that.
9 So we also had to lay off people just in terms of looking at
10:23:57 10 what our revenue base could afford and what we wanted to return
11 to our owners.

12 Q. I'd like to hand up the witness a copy of an exhibit
13 that's been premarked as PX 486. Thank you.

14 Mr. Flott, have you seen this document before?

15 A. I have.

16 Q. And at a high level, what is this document?

17 A. It reflects the revenues of the U.S. recorded music
18 business over a period of time.

19 Q. Where does this document come from?

10:24:39 20 A. It comes from the RIAA, which is our U.S. industry
21 association.

22 Q. And how is it that you come across this type of document?

23 A. It is regularly published, and it's a document that I look
24 at on a regular basis.

25 With the RIAA, we do a regularly quarterly call where

1 we go through performance. It's also on their Web site as
2 well.

3 MS. NOYOLA: I'd like to move PX 486 into evidence.

4 THE COURT: Any objection?

5 MR. BUCHANAN: No, Your Honor.

6 THE COURT: It's received.

7 BY MS. NOYOLA: (Continuing)

8 Q. Mr. Flott, can you describe what this chart shows.

9 A. This chart is reflecting the U.S. recorded music revenues.

10:25:28 10 If I look at the left most column, that's marked as the year
11 2000 where industry revenues were in excess of \$14 billion.

12 It continues to the right to 2014 where the revenues
13 are just under \$7 billion.

14 Q. And is this chart specific to Warner Music Group?

15 A. No, it's the U.S. recorded music revenues.

16 Q. Tell us what these different colors on this chart show.

17 A. Each color represents a different format. So the largest
18 color that you see on the left side of the page being orange,
19 that's the compact disc.

10:26:15 20 And as you move to the right, you'll see other
21 formats as they came into play. So in 2004, you start to see
22 purple. That is the -- that's a download, and the different
23 shades are the different forms of whether it was a single or an
24 album.

25 And then we start to see in 2005 green start to come

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1 in. And that is streaming and the different types of streaming
2 revenues that come through.

3 Q. Are you familiar with the term "music consumption"?

4 A. Yes, I am.

5 Q. What does that term mean?

6 A. Music consumption means the number of hours that a
7 consumer is -- generally commits to listening to music.

8 Q. And in your day-to-day work, have you become familiar with
9 the volume of music consumption over this time frame of 2000 to
10 2014?

10:27:19

11 A. Yes.

12 Q. And how so?

13 A. In additional reports that either I've seen come from the
14 RIAA or other published articles, there's reference made to the
15 number of hours that a consumer, you know, has committed and
16 how it's grown from 2000 through to today.

17 Q. What is your understanding of the volume of music
18 consumption from 2000 to 2014?

19 A. It has continued to increase year over year, and I think
20 towards the end of this chart, I believe consumers are
21 committing almost a week a year -- a week a -- sorry. A day a
22 week to consuming music.

10:27:58

23 Q. So how does that trend of music consumption compare to the
24 trend that's shown here about -- on recorded music revenues?

25 A. Well, in a normal business model, you would expect -- as

1 consumption grows, you would expect revenues to grow in line
2 with it. There may be some shifts as things go, but generally
3 the trend that we've seen with other formats as they've come in
4 is that you've seen revenue growth, not revenue decline.

5 Q. So how do you explain the revenue decrease over this time
6 period if music consumption is increasing over the same time
7 period?

8 A. At this same point in time where we made the turn of the
9 century is really when peer-to-peer piracy was starting to grow
10:29:04 10 at just increasing rates. And peer-to-peer piracy, by its
11 nature, is not a sale. It's actually -- it's stealing music.
12 None of those tracks that are being shared peer-to-peer are
13 being paid for.

14 And as a byproduct, artists, copyright holders,
15 union, and the rest of the people within the music industry
16 aren't being paid for those illegal transactions.

17 Q. And has Warner Music Group ever tried to calculate its
18 harm from peer-to-peer piracy?

19 A. We've not, other than on a macro -- you know, a macro
10:29:54 20 basis.

21 Q. And why haven't you calculated -- why haven't you been
22 able to calculate Warner Music Group's harm?

23 A. The nature of peer-to-peer piracy is it's viral, and
24 probably maybe the best way I can try and explain how viral it
25 works is if we use an example of a pebble going into a pond and

1 it's starting to create ripples. It's not about the first
2 transaction or the first infringement that takes place. Once
3 that track gets put up on a site that can be shared, it's then
4 shared amongst, you know, whoever wants to take it and whoever
5 then they share it with and they share it with.

6 So if you kind of think about that initial pebble
7 coming in, and then the next person taking it and their pebble
8 dropping in, it creates just these multiple waves. So the
9 viral nature of it, just trying to understand where that wave
10 stops is -- has not been -- it's not something that we've been
11 able to do.

12 Q. When users illegally download and distribute works on
13 these peer-to-peer networks, how do record companies get paid?

14 A. We don't because they're stolen and they don't -- they're
15 not paying anyone.

16 Q. And how did --

17 A. Including our artists, including our copyright holders,
18 including, you know, all of the other people within the chains,
19 the union musicians, the marketing people, and, you know, the
20 artists themselves. You know, ultimately no one is getting
21 paid from those transactions.

22 MS. NOYOLA: Thank you, Mr. Flott.

23 Pass the witness.

24 THE COURT: Cross-examination.

25 MR. BUCHANAN: Yes, Your Honor.

1 CROSS-EXAMINATION

2 BY MR. BUCHANAN:

3 Q. So the -- good morning, Mr. Flott.

4 A. Good morning.

5 Q. My name is Tom Buchanan. I have a few questions for you.

6 A. Okay.

7 Q. This -- the source of this information is your lobbying
8 group, RIAA; is that right?

9 A. It's our industry association, yes.

10:32:17 10 Q. And I think you said you're the executive vice-president
11 and CFO of Warner Music Group?

12 A. Of the Recorded Music Division.

13 Q. Okay. Did you prepare a chart like this like on a
14 quarterly or annual basis for your Board?

15 A. No, we would've leveraged this schedule since it's put
16 together for the overall industry.

17 Q. So the answer is, you did not present a chart like this to
18 your Board during this period of time?

19 A. I don't know during this period of time.

10:32:51 20 Q. Okay. When I say, this period of time, I'm talking about
21 2000 to 2014, those 14 or 15 years. Was this something that
22 you as the CFO of the company would typically would prepare and
23 present to the Board of Directors so they would know what was
24 going on in the market?

25 A. During this period of time from 2000 to 2006, I was not

1 with the company. And in 2014 is when I initially took the CFO
2 for Recorded Music job.

3 Q. Okay.

4 A. So it may have -- it may have been presented prior, but I
5 -- during this period of time, I would not -- I did not present
6 it.

7 Q. Okay. When did you start with the company?

8 A. Initially or?

9 Q. Initially.

10:33:36 10 A. 1983.

11 Q. Okay. And so, what period of time were you there from
12 2000 to 2014?

13 A. 2006 through 2014.

14 Q. Okay. So do you recall this type of data being presented
15 to the Board of Directors while you were there?

16 A. I don't know.

17 Q. You don't know? Did you ever do it?

18 A. I did not do it on --

19 Q. Okay.

10:33:58 20 A. -- you know, for the Board. They may have gotten it from
21 the existing management team at the time.

22 Q. Okay. So have you ever -- you prepared for this trial to
23 come in and testify, correct?

24 A. Yes.

25 Q. So this says RIAA. I am asking you now, did you go back

1 and try to determine from all the financial records that you
2 have access to by computer to determine whether this sort of
3 data was gathered considering its importance and present it to
4 the Board of Directors at any time?

5 A. I did not, no.

6 Q. Okay. So this is -- this covers the globe, right, this
7 data?

8 A. No.

9 Q. Okay. So these are U.S. sales, right, of your company?

10:34:45 10 A. No. This is U.S. sales of the recorded music.

11 Q. Okay. So what I'm getting at in terms of the impact of
12 piracy only, that would be global, right?

13 A. That's correct.

14 Q. Okay. So that would be China, India, the Far East, South
15 America, the entire world?

16 A. That's correct.

17 Q. Okay. Do you know what the impact of piracy by people
18 outside of the United States, how that impacted this?

19 A. Well, the United States is the largest market and has been
10:35:15 20 the largest market in the world for as long as I can recall.

21 And --

22 Q. So do you -- but there are, obviously, a lot of other
23 people out there with computers that could access music through
24 BitTorrent, correct?

25 A. Sure.

1 Q. There are billions out there, right?

2 A. Sure.

3 Q. Okay. I am wondering, does this in any way distinguish
4 between the impact of piracy on the sales of CDs or whatever
5 else and the peer-to-peer piracy? Does this chart capture the
6 impact of those people outside the United States versus those
7 in?

8 A. This chart wouldn't because it only reflects legitimate
9 sales.

10:35:57 10 Q. Okay. But the piracy, you're trying to capture the impact
11 of piracy on revenues, right?

12 A. That's correct.

13 Q. Okay. So if people outside the United States are
14 downloading music illegally, that doesn't distinguish between
15 the people who did it in the United States? This is just a
16 chart that shows the numbers going down.

17 So do you know who, in fact, is doing this, you know,
18 outside the United States? Do you have any idea of the impact
19 on peer-to-peer networks of illegal downloading outside the
10:36:28 20 United States during this time period?

21 MS. NOYOLA: Objection, Your Honor.

22 THE COURT: This document doesn't capture any piracy
23 numbers. So your question is confusing. Reframe it, please.

24 MR. BUCHANAN: Okay. All right.

25 BY MR. BUCHANAN: (Continuing)

1 Q. So this document just shows revenues for these different
2 types of products sold by your company and other record label
3 companies in the United States, correct?

4 A. That's correct.

5 Q. Okay. And the point you're making here, is it not, by
6 this chart is try to show the impact of piracy on sales?

7 A. All this chart does is reflects the trend, what has
8 happened to our revenues from 2000 to 2014 by the formats that
9 we operated.

10:37:08 10 Q. Okay. So you don't know what is driving this revenue
11 down? Say the great recession, 2007, 2008, 2009, you don't
12 have any idea how that impacted these particular sales that are
13 reflected on this chart?

14 A. Well, we do know that while -- well, we do know that if
15 you look at music consumption and in a normal business model,
16 you would not expect revenue decline in a period when you have
17 consumption increasing.

18 Q. Okay. So increased consumption could be someone goes on
19 iTunes, buys a song, listens to it all week long. How does
10:37:47 20 that affect the revenues on here, that increased consumption?

21 A. If someone goes to iTunes and buys a song, it's treated as
22 one sale.

23 Q. Right.

24 A. Regardless of how many times they listen to it, it's still
25 in this chart and would only be reflected as one song.

1 Q. Okay. And isn't that a very common way for people to
2 listen to music today or in the last five years, is on their
3 phones and with head pieces?

4 A. It is, but that consumption has changed from a download to
5 more of a streaming market as evidenced by the way the bars are
6 going.

7 Q. Right. And streaming is going up dramatically, it has
8 been going up dramatically for years, correct?

9 A. That's correct.

10:38:31 10 Q. And that is reflected on this chart?

11 A. That's right.

12 Q. And you're capturing revenue from streaming?

13 A. We are.

14 Q. Right. And that's a natural consequence, right? That
15 people that are switching from, say CDs, which are bulky and
16 cost a lot of money, to switch to streaming; isn't that true?

17 A. That's one, that's one factor. But while you -- while you
18 look at that, at the same time you would not expect in a market
19 where consumption is increasing, for your revenue to decrease.

10:39:00 20 We want to make sure that consumers have the ability
21 to enjoy their music in whichever medium and whichever format
22 they have. If you go back to when other formats have been
23 introduced over time, when the CD came in, when other formats
24 have come in, we have not seen a decline in revenue the way
25 that we're seeing here.

1 And if you look at the increase in peer-to-peer
2 activity and what it has done on consumption, you're not seeing
3 revenue correlate with the increased demand for music overall.

4 Q. So in terms of the decrease of CD sales in this chart,
5 isn't it true that there was an industry where people were
6 actually manufacturing CDs and basically stealing them?

7 A. That was a type of piracy similar to people buying
8 cassettes back in the '70s and '80s and creating their own mix
9 tapes.

10:40:14 10 Q. So is that reflected in this chart, the impact of piracy
11 on sales versus people's downloading music illegally versus
12 manufacturing illegally CDs?

13 A. Again, any illegitimate sale, any, you know, element of
14 piracy, whether it's physical piracy, whether it is download
15 piracy, whether it is -- now what we're dealing with is stream
16 ripping, none of those are sales. So we would not have
17 collected any revenue, paid our artists, and they wouldn't be
18 reflected within the revenue of this chart.

19 Q. So the illegal downloading that you've referenced, that
10:40:55 20 takes place by subscribers do that who are on ISPs who have
21 access to Internet service, correct?

22 A. Yes.

23 Q. Okay. And I believe in your deposition you said there are
24 sort of three approaches that you take to try to stop this --

25 MS. NOYOLA: Objection, Your Honor.

1 Q. Peer-to-peer, is one --

2 THE COURT: I'm sorry, there is an objection. Just
3 ask him straight out.

4 MR. BUCHANAN: Okay.

5 BY MR. BUCHANAN: (Continuing)

6 Q. Isn't it true that there are sort of three approaches that
7 you take at your company to try to stop this illegal
8 downloading, education, legislation, litigation, right?

9 A. That's correct.

10:41:33 10 Q. Okay. And your company for years sued individual
11 subscribers, did it not?

12 MS. NOYOLA: Objection, Your Honor, outside the scope
13 of direct.

14 THE COURT: Overruled. I will allow it.

15 BY MR. BUCHANAN: (Continuing)

16 Q. Isn't that true?

17 A. Yes.

18 Q. Okay. And how many years did you pursue that strategy of
19 suing individual subscribers?

10:41:54 20 A. I don't recall the specific, but for a number of years.

21 Q. Maybe ten? Do you know?

22 A. I don't know.

23 Q. Okay. And it didn't matter who the individual subscriber
24 was, whether it was a grandmother, a kid, a student, you would
25 sue them for illegal downloading, right?

1 MS. NOYOLA: Objection, Your Honor. The witness has
2 testified he doesn't know.

3 THE COURT: Yeah. Sustained.

4 BY MR. BUCHANAN: (Continuing)

5 Q. So do you know when you stopped that strategy of suing
6 individual subscribers?

7 A. I don't recall the specific year, no.

8 Q. Okay. Do you know why you stopped it?

9 A. Our preference has always been not to act to litigate.

10:42:31 10 Our preference would be to deal with education and with
11 legislation, and to, you know, work with those networks, the
12 ISPs, to make sure that their customers are educated and
13 understand that there are consequences to performing illegal
14 activity.

15 Q. So if your preference was education, why did you have a
16 campaign for at least five years of suing individual
17 subscribers?

18 MS. NOYOLA: Objection, Your Honor, again --

19 THE COURT: Sustained. Facts not in evidence. He
10:43:05 20 just said he didn't know how long. So revise your question,
21 please.

22 BY MR. BUCHANAN: (Continuing)

23 Q. So forget the years part. You testified that you had a
24 campaign where you sued individual subscribers for a number of
25 years, you don't know how many.

1 And so I am saying, at what point in time did you
2 decide -- did the company decide the preference wasn't to sue
3 individual subscribers but to educate?

4 A. Well, all three of those go hand in hand. You know,
5 education, legislation, and litigation. Our preference was not
6 to go through and to litigate. But, you know, at that
7 particular point in time there was a question as to the
8 legality of the point. So we had to protect our artists'
9 rights, and we needed to make sure that individuals understood
10:44:03 10 that if they were -- if they were stealing, that they needed to
11 understand that there were consequences.

12 You wouldn't, you wouldn't walk into -- I don't think
13 anyone would think that if you walked into a car dealership and
14 they gave you the keys, that you could just drive off. And
15 intellectual property is not any different than that.

16 Q. So my question is, as you said, you had legislation,
17 education, and litigation. So we talked about the litigation
18 against individual subscribers.

19 What were you doing education-wise while the campaign
10:44:38 20 to sue individual subscribers was going on?

21 A. The RIAA had a number of different programs. We have
22 information that was put within our CDs, information on our
23 website.

24 So I know that I, myself, you know, would talk to my
25 kids' friends who would come over and try and get them to

1 understand that it's stealing. And, you know, it was not the
2 most comfortable conversations in my house with their friends,
3 and some of them wouldn't come back.

4 Q. So isn't the reason -- isn't the reason that your company
5 stopped suing individual subscribers, file sharers, is because
6 of the bad publicity?

7 A. No.

8 Q. You don't believe that's the case at all?

9 A. I believe that our strong preference is not to litigate
10:45:38 10 and -- but we also needed to make sure that individuals
11 understood the consequences of doing things illegally. And
12 we've tried to move forward from there and, you know, continue
13 with education and legislation.

14 Q. So part of that education process was when your company
15 and the other record labels entered into the Copyright Alert
16 System with five of the major --

17 MS. NOYOLA: Objection, Your Honor, outside the
18 scope. And counsel is testifying as to facts not in evidence.

19 MR. BUCHANAN: It's cross.

10:46:17 20 THE COURT: I am going to allow it. It is beyond the
21 scope of direct examination. I will allow you to redirect if
22 you think it's appropriate.

23 If he is aware of it.

24 MR. BUCHANAN: Right.

25 BY MR. BUCHANAN: (Continuing)

1 Q. So you talked about education being important?

2 A. Yes.

3 Q. And the Copyright Alert System was based not on litigation
4 but on education, right?

5 A. Yes.

6 Q. Okay. And your company and other record label companies
7 spent years studying the ability for the CAS program to work,
8 right, before they entered into these memorandum of
9 understandings?

10:46:57 10 A. I believe so.

11 Q. Okay. And so, did you look at any of the due diligence
12 that was done by the record label companies before they entered
13 into CAS, the data that went into it, to indicate that this
14 education system by using notices versus termination or
15 litigation would work?

16 A. I didn't, but it's not in my area of responsibility.
17 That's, you know, for our business and legal affairs team.

18 Q. Right. But the decision to enter into CAS was very
19 important to your shareholders and to your artists, right?

10:47:34 20 A. Yes.

21 Q. Because you were making a decision as a company, along
22 with the other record label companies, to stick with alerts and
23 notices and not termination or litigation, right?

24 MS. NOYOLA: Objection, Your Honor, foundation.

25 THE COURT: Yeah, there's no foundation. Sustained.

1 BY MR. BUCHANAN: (Continuing)

2 Q. Okay. Do you understand CAS, that it didn't require
3 termination, right?

4 A. I have a general understanding of it. Our legal
5 department is really the area where that is handled.

6 Q. Okay. So you understand with an education program, it
7 didn't require termination of a subscriber, right?

8 MS. NOYOLA: Objection, vague, Your Honor.

9 A. I don't know that.

10:48:12 10 THE COURT: Okay. He answered. He said, I don't
11 know.

12 BY MR. BUCHANAN: (Continuing)

13 Q. All right. So again, you agree, though, that this was a
14 major step because you're basically foregoing litigation and
15 you're going toward education with the ISPs, right?

16 A. I don't think we were foregoing litigation. Our
17 preference was to go education.

18 Q. Okay.

19 A. But, again, it's not my area of responsibility.

20 Q. Right.

21 A. It's the responsibility of our general counsel and our
22 business and legal affairs department.

23 Q. So are you aware that under CAS, they would -- the ISPs
24 would collect all the data that came in from the -- as to the
25 subscribers, all the notices per subscriber per day, and they

1 would collect that data and they would send it back to your
2 company?

3 MS. NOYOLA: Objection, Your Honor, same issue,
4 foundation.

5 THE COURT: Yeah, let's --

6 MS. NOYOLA: He has already asked and answered that
7 he doesn't have any familiarity --

8 THE COURT: Stop, stop. Do you understand the
9 question? The specifics of the -- he's indicated he doesn't
10:49:26 10 have any personal familiarity, it's not his area of the
11 company. And you're hitting with a pretty broad question.

12 MR. BUCHANAN: Okay.

13 THE COURT: So ask him whether he's familiar with
14 what CAS was doing with any data.

15 BY MR. BUCHANAN: (Continuing)

16 Q. So I'm asking you, as the CFO of Warner Music Group, did
17 you get any data pursuant to CAS, either you or anyone in the
18 company, pursuant to CAS that showed the effectiveness of this
19 education program that was so important to your artists?

10:50:05 20 A. So just to correct, the CFO for Recorded Music, not Warner
21 Music.

22 Q. Okay.

23 A. It is possible it went into our legal department. I don't
24 have knowledge of whether we received it or what was done with
25 it.

1 Q. So you were deposed in this case, correct?

2 A. Yes.

3 Q. And you prepared for your testimony here today, right?

4 A. I did.

5 Q. So is it -- and you're saying that in doing both of those
6 things, you never looked at the data that you got pursuant to
7 this CAS program from the ISPs to see if it was effective --

8 MS. NOYOLA: Objection, asked and answered.

9 Q. -- and that they were actually stopping --

10 THE COURT: Hold on.

11 BY MR. BUCHANAN: (Continuing)

12 Q. They were actually stopping infringement --

13 THE COURT: Overruled.

14 BY MR. BUCHANAN: (Continuing)

15 Q. Did you --

16 THE COURT: He may answer.

17 THE COURT REPORTER: I'm sorry, Your Honor.

18 THE COURT: Yeah, I apologize. If you understand the
19 question.

20 But he wasn't the CFO at the time during CAS, so
21 let's be clear about that as well.

22 MR. BUCHANAN: Right.

23 THE COURT: But back in -- if you want to direct him
24 to 2010 and ask him whether he was aware -- go ahead.

25 BY MR. BUCHANAN: (Continuing)

1 Q. So do you know if the data that CAS was collecting on the
2 effectiveness of this education program to protect the rights
3 of all these artists you talked about, whether that was
4 provided to your company?

5 A. I don't personally know.

6 Q. Have you attempted to look for that information as part of
7 your coming into court today and to testify to the Court and
8 the jury?

9 A. My understanding was that's not what I was being asked to
10 be here to testify to.

11 Q. Okay. So are you aware of the members of CAS, that it was
12 Verizon, and Comcast, Cablevision, Time Warner, AT&T?

13 A. Again, I have a general understanding of CAS. I don't
14 have the specific understanding of CAS.

15 Q. Did you know that those companies were the other members
16 with your company and the other record label companies that
17 made up CAS?

18 A. Again, I don't know. So I'm not going to say that I do
19 know. I apologize.

20 Q. Would you agree that -- you just gave an example about
21 someone going into a used car dealership or something and
22 stealing a car.

23 So would you agree that if those five, those five
24 ISPs that were part of CAS, whether -- if they were basically
25 for five years given the opportunity to process notices but not

1 terminate anybody for five years, would that not create a
2 market for infringement?

3 THE COURT: That was a totally improper question.
4 And the objection is sustained.

5 Let's move on.

6 MR. BUCHANAN: Okay.

7 BY MR. BUCHANAN: (Continuing)

8 Q. So do you have any idea of -- you know, you talked about
9 in that chart what you believe is the impact of illegal
10 downloading on U.S. sales. And do you recall you testified
11 that you believed that consumption was going up and that
12 American citizens were the main people that are consuming music
13 in the world comparatively; is that right?

14 A. I believe what I said is the U.S. is the largest
15 territory. But this schedule here just reflects the U.S.
16 recorded music business.

17 Q. And so, for a U.S. -- person in the United States to
18 illegally download music, they would have to use an ISP in the
19 United States, right?

20 A. That would be one way that they could, yes.

21 Q. So did you attempt to determine how much of the illegal
22 downloading took place during the five years of CAS by the five
23 ISPs that were part of CAS?

24 MS. NOYOLA: Objection, Your Honor.

25 THE COURT: Sustained.

1 MR. BUCHANAN: Okay.

2 BY MR. BUCHANAN: (Continuing)

3 Q. Do you know if there was any information about -- and you
4 may not know this either, but with regard to CAS, any data, was
5 it -- do you know if it was ever shared with the artist?

6 MS. NOYOLA: Objection. Your Honor, we would like a
7 sidebar.

8 THE COURT: I'm sorry?

9 MS. NOYOLA: We would like a sidebar, please.

10 THE COURT: Yes.

11 NOTE: A sidebar discussion is had between the Court
12 and counsel out of the hearing of the jury as follows:

13 AT SIDEBAR

14 MS. NOYOLA: Your Honor, Mr. Buchanan has had some
15 questioning of the witness material times on CAS, and he's
16 already testified that he has no personal knowledge about the
17 specifics of CAS. And he was not CFO during the negotiations
18 of the CAS.

19 THE COURT: Where are you going?

20 MR. BUCHANAN: Well, where I was going is he
21 basically testified as an expert about, you know, the music
22 industry, how it was going down, the impact of piracy, the
23 American consumption of music, even though he is the CFO for
24 this short period of time. So how does he get all of that
25 information? Okay. The RIAA gives it to him. And he makes

1 this chart.

2 What I'm trying to show is, well, look, if that's so
3 important, okay, if it's the ISPs out there that are allowing
4 this infringement, what are you doing with regard to the five
5 that you didn't take any action against and you basically gave
6 them a free pass? That created a market for everybody to go
7 to, arguably --

8 THE COURT: Yeah, but he doesn't have that
9 information.

10 MR. BUCHANAN: Okay.

11 THE COURT: I mean, he's different than the other
12 people who were up here. He is a CFO -- and he wasn't the CFO
13 during the CAS period of time.

14 MR. BUCHANAN: Right.

15 THE COURT: He has answered. I mean, frankly, I
16 thought you had been asking these questions just so I'll object
17 and it will somehow look like I'm trying to preserve the
18 witness from having to testify.

19 MR. BUCHANAN: No, no.

10:56:18 20 THE COURT: But this is way off his plate.

21 MR. BUCHANAN: Okay. All right.

22 THE COURT: So your objection is sustained. Let's
23 move on to something else.

24 MR. BUCHANAN: All right.

25 MR. OPPENHEIM: Does this mean there will be no

1 further questions on CAS with this witness? Because this has
2 become --

3 THE COURT: Yes, yes, no more CAS.

4 NOTE: The sidebar discussion is concluded; whereupon
5 the case continues before the jury as follows:

6 BEFORE THE JURY

7 THE COURT: I was trying to finish up this witness
8 before our break, but would you like a break now or --

9 A JUROR: I could use it.

10:56:54 10 THE COURT: You would like a break now?

11 Okay. All right. Let's take 15 minutes right now.
12 We have got a couple of heads shaking that they would like it
13 now.

14 So let's take 15 minutes and we'll come back.

15 NOTE: At this point the jury leaves the courtroom;
16 whereupon the case continues as follows:

17 JURY OUT

18 THE COURT: All right. Anything before we break?

19 MR. BUCHANAN: No, Your Honor.

10:57:37 20 THE COURT: Okay. Then we're going to take
21 15 minutes.

22 Mr. Flott, you're in the middle of your testimony, so
23 don't discuss the testimony you've given so far while you're on
24 break. All right, sir?

25 All right. Thank you.

1 All right, we're in recess.

2 NOTE: At this point a recess is taken; at the
3 conclusion of which the case continues in the absence of the
4 jury as follow:

5 JURY OUT

6 THE COURT: All right. Are we ready for our jury?

7 MS. NOYOLA: Your Honor, we wanted to raise an issue
8 regarding the scope of Mr. Buchanan's cross-examination. We
9 understand he may raise some questions about current streaming,
11:16:53 10 current -- and Warner Music's current revenues.

11 We do not believe these are relevant to the issues in
12 the case. It is outside the bounds of the direct examination,
13 outside the bounds of this case.

14 THE COURT: So present day streaming numbers?

15 MR. BUCHANAN: Well, the witness testified that
16 streaming -- when it started and how it progressed, and it came
17 up to the present.

18 THE COURT: And he had the graph.

19 MR. BUCHANAN: In addition, Dr. Lehr has all this
11:17:19 20 comparisons between the current value of Cox, you heard that in
21 opening, how much we were worth. And so, you know, we have a
22 right to compare what these companies are worth.

23 THE COURT: Hasn't this testimony already came in --
24 come in for the other plaintiffs in the case?

25 MR. OPPENHEIM: Not the current -- so I think the

1 issue is current revenues and streaming revenue, not relevant.

2 Cox's revenues are clearly relevant under the factors
3 for statutory damages. But the plaintiffs, during the time at
4 issue, absolutely. But beyond the time at issue, not.

5 At a high level, do we care? But it's outside the
6 scope. But I believe that what's going to be elicited here,
7 just based on some documents that we are seeing, is we are in
8 the trends of streaming revenues now and what's happening. And
9 all of what happened after 2014 in terms of revenue trends, is
10 outside the scope of this case.

11:18:17

11 MR. ELKIN: Your Honor, very briefly, not to rehash
12 everything.

13 THE COURT: Mr. Elkin.

14 MR. ELKIN: I don't think that Mr. Buchanan is going
15 to get very much into this, really if at all, but I just want
16 to put a bookmark here. It has come in through Kooker, it has
17 come in through other witnesses. Quite a number of witnesses
18 so far have either touched upon it directly or indirectly.

19 As I mentioned when this issue cropped up earlier in
20 the trial, I do think to the extent they are seeking willful
21 copyright infringement and seeking statutory damages,
22 deterrence is an issue. The market has changed, I don't think
23 it's really in dispute.

11:18:44

24 I don't want to belabor the other points, I just
25 wanted to make sure that we had that reminder.

1 THE COURT: Okay. Thank you.

2 MR. OPPENHEIM: One last point, if I may, Your Honor.

3 THE COURT: Yeah.

4 MR. OPPENHEIM: In the opening, if we could just pull
5 up the slide, this is the slide that was put up in the opening
6 by Cox.

7 THE COURT: I understand. And I allowed the general
8 revenues to come in for the point that Mr. Elkin just made,
9 which is the industry has gone away from P2P -- that's a
10 misstatement.

11 The industry has moved on to different ways to
12 transfer digital music, and that it may relate to whether or
13 not there is a likelihood of future infringement given the
14 marketplace.

15 So if it's not clear to you what I just said --

16 MR. OPPENHEIM: So if what Your Honor is getting at
17 is the issue of deterrence under the -- as one of the factors
18 in statutory damages --

19 THE COURT: Right.

11:20:12 20 MR. OPPENHEIM: -- what the current revenues
21 structure is for the plaintiffs is not a reflection of the harm
22 that is potentially done from a particular type of piracy.

23 So let's say we had a new format, and that new format
24 was USB hard drives that got sold in stores. That would be
25 entirely -- you know, if it happens after the point in time, it

1 is irrelevant to the question of the deterrence of Cox.

2 The peer-to-peer piracy may be the reason that
3 downloads are down. I mean, they could elicit that. But going
4 into what a new format is is entirely irrelevant.

5 All they are trying to do is say, look, these
6 companies are now making a lot of money because they are
7 finding ways to deal with the piracy that we're allowing.
8 That's not a place this case should go.

9 THE COURT: Well, it is of marginal relevance. I'll
11:21:07 10 allow you to ask whether he is aware of the revenues, whether
11 they have recovered using different methods, and then let's
12 move on. Okay?

13 All right, thank you. Your exception is noted --

14 MR. OPPENHEIM: Thank you, Your Honor.

15 THE COURT: -- Mr. Oppenheim.

16 All right. Let's get our jury, Joe.

17 NOTE: At this point the jury returns to the
18 courtroom; whereupon the case continues as follows:

19 JURY IN

11:22:02 20 THE COURT: All right. Please have a seat.

21 And let's continue, Mr. Buchanan.

22 BY MR. BUCHANAN: (Continuing)

23 Q. A few more questions, sir.

24 On this chart, it starts in 2000, correct?

25 A. Yes.

1 Q. And 1999 was the advent of Napster; is that correct?

2 A. In that area, yes.

3 Q. Okay. And in 2001 you had iTunes and Apple?

4 A. No, it -- iTunes started late 2003, early 2004.

5 Q. Okay. And that led to what they call the disaggregation
6 of the album, the CD album, correct?

7 A. It created a different format.

8 Q. Right. And the format was you could now pick and choose
9 whatever individual song you wanted, you didn't have to go buy
10 a CD with 26 songs that cost 25 bucks; isn't that right?

11:23:01 11 A. If a consumer chose to do that, yes, but they still had
12 the ability to buy music in whichever way that they wanted to.

13 Q. Right. But they could make a choice between going on to
14 iTunes and paying a dollar for their favorite song versus going
15 to a record store and paying \$25 for an album that had 25 songs
16 and really only wanted one, right?

17 A. That is -- was their option, yes.

18 Q. So one of the other things that, as I understand it, that
19 your company did to counter the loss of CD sales due to piracy
11:23:42 20 and downloading was to sign artists up to what they call

21 360 deals; is that right?

22 A. That's correct.

23 Q. And they involved basically trying to find artists at the
24 beginning of their career and then expanding the rights that
25 your company would own vis-à-vis that artist, right?

1 A. We approached artists, not just at the beginning of their
2 career, but during their career as well.

3 Q. But the 360 deals, didn't you sort of use those to expand
4 the rights that would be owned by your company versus the
5 artists' rights, right?

6 A. They still were the artists' rights, we just created
7 whatever the contractual relationship would be as to how much
8 they would get paid from us working those rights for them.

9 Q. Okay. So it basically -- and I read this in the financial
11:24:32 10 statement about these expanded rights, what it meant was that
11 you then would have a greater return of the return on their
12 product, correct?

13 A. That's not necessarily the case. You would have to look
14 at each right and how we shared those different revenues.

15 Q. Okay. So -- but isn't it true that under these 360 deals,
16 you went to artists and you then tried to capture an interest
17 in more of what you were doing for them to increase revenues
18 for your company?

19 A. We didn't do anything that any business would do. We were
11:25:10 20 trying to acquire the maximum amount of rights that we could --

21 Q. Okay.

22 A. -- and they benefit both the artist and ourselves.
23 Ultimately, it's the artist's decision as to whether they
24 wanted to sign up with us and have us work those rights for
25 them.

1 Q. Right. So you talked about the work you do for artists.
2 It's true that you had disputes over ownership and collections
3 with your artists over the years, haven't you?

4 MS. NOYOLA: Objection, Your Honor, outside the
5 scope.

6 THE COURT: Sustained.

7 MR. BUCHANAN: Okay. Your Honor --

8 THE COURT: This whole field is off.

9 BY MR. BUCHANAN: (Continuing)

11:25:53 10 Q. Okay. So I want to ask you some questions about the
11 financials of the company. And I have -- do you have a binder
12 there?

13 First of all, Warner Music Group, you are owned by
14 Access Industries; is that correct?

15 A. Currently, yes.

16 Q. And that's a private equity company?

17 A. Yes.

18 Q. Okay. And who is the major shareholder in that company?

19 A. Len Blavatnik.

11:26:33 20 Q. And he is a Ukranian; is that right?

21 MS. NOYOLA: Objection, Your Honor.

22 THE COURT: Relevance is sustained. I said you could
23 get into the revenues in just kind of a conclusory manner, and
24 you may do that, please.

25 BY MR. BUCHANAN: (Continuing)

1 Q. And do you know what price that Access Industries paid for
2 Warner Music Group?

3 MS. NOYOLA: Objection, Your Honor.

4 THE COURT: You may answer the question if you know.

5 A. It was a little over \$3 billion.

6 BY MR. BUCHANAN: (Continuing)

7 Q. Okay. And when did that take place?

8 A. I believe it was July of 2011.

9 Q. Okay. And what is the approximate worth of your company
11:27:18 10 today?

11 A. We don't -- we don't trade external debt. So you would --
12 if you are asking me just about the Recorded Music Division
13 versus overall Warner Music Group?

14 Q. What is -- do you know what the current value is of Warner
15 Music Group?

16 A. I don't because it -- there is multiple factors that would
17 go into what the value would be currently.

18 Q. That is not something that you calculate for the Board or
19 for the --

11:27:55 20 A. I don't. The corporate, the corporate group does that.

21 Q. All right. But you don't know that information?

22 A. I -- you know, there are different valuations that are
23 done at different points in time. I don't have the current
24 value.

25 Q. So you understand that the claim period here is

1 February 2013 through November 2014; is that right?

2 A. That's my understanding.

3 Q. All right. And do you know the amount of revenue that WMG
4 generated for the fiscal year 2014?

5 A. I believe it's in one of these documents, right?

6 Q. Right. So I can show you the document, but is it about
7 \$3 billion? Would that be about right?

8 A. Again, I would want to look at the exhibit.

9 Q. Okay. That's fine. Why don't you look at tab 6.

11:28:46 10 A. Okay.

11 Q. And see if you can -- I would look at page 44, the big
12 number down at the bottom, DX 2844.

13 A. Okay.

14 Q. Do you see the Total Revenue column?

15 A. I do.

16 Q. It says for 2014, three billion?

17 A. I do.

18 Q. And then 2013, 2.8 billion?

19 A. That's correct.

11:29:22 20 Q. And for 2012, 2.7 billion; is that correct?

21 A. 2.8, yes.

22 Q. All right. Now, you mentioned streaming before.

23 Streaming is a large, significant part of the revenue that has
24 been coming into the company for the last two or three years,
25 is it not?

1 A. It is.

2 Q. Okay. And do you know how much -- the percentage that
3 revenue from streaming has gone up over, say, the last year or
4 two?

5 A. The last year being which period of time?

6 Q. Say 2019, are you aware that the streaming revenue was up
7 23 percent in 2019 over 2018?

8 A. That sounds like it's right from our external reporting we
9 just did.

11:30:17 10 Q. Right. And for streaming, active streaming, for people to
11 stream, they need a high speed internet service, correct?

12 A. They don't have to have it, but it makes the experience
13 better if they do.

14 MR. BUCHANAN: I think that's all the questions I
15 have. Thank you.

16 THE COURT: All right. Redirect.

17 REDIRECT EXAMINATION

18 BY MS. NOYOLA:

19 Q. Mr. Flott, as chief financial officer for Warner Music
11:30:57 20 Group, what sort of information do you regularly provide to the
21 Board of Directors?

22 A. We provide the performance of the company on a periodic
23 basis. Normally looking at kind of current quarter and our
24 fiscal years to date. And comparing that as well to our prior
25 periods on either an as-reported or a constant-currency basis.

1 Q. Does the information you provided to the Board include
2 market trends?

3 A. It does.

4 Q. Why do you as chief financial officer look at music
5 consumption levels and compare that to revenues?

6 A. Based on normal consumption, we are trying to determine
7 whether or not the market is growing. And it gives us an
8 indication as to whether we are growing at the same level or
9 whether there are other factors impacting our growth.

11:32:07 10 Q. Do you recall some questions regarding CD piracy?

11 A. That's correct.

12 Q. How does CD piracy compare to the peer-to-peer piracy that
13 is at issue in this case?

14 A. If you look at kind of CD piracy, it's a -- it's having to
15 do with a physical copy and, you know, it is a, you know, a
16 machine-to-machine basis.

17 Peer-to-peer, it can be done in almost any digital
18 format through phone, through computer, through tablet, through
19 any other sources, and then can spread. You know, it's a
11:32:59 20 virtual copy that then can be spread and shared seamlessly and
21 much easier than CD piracy.

22 Q. And with peer-to-peer piracy, how can you tell how many
23 copies are further made or distributed after that first copy?

24 MR. BUCHANAN: I am going to object, Your Honor. I
25 don't think he is an expert in this area. He already went

1 through this.

2 THE COURT: Lay a foundation.

3 MS. NOYOLA: I will move on to the next question.

4 BY MS. NOYOLA: (Continuing)

5 Q. Do you recall your testimony, your being asked questions
6 about the prices of CDs back in the '90s and early 2000s?

7 A. Yes.

8 Q. What was the general price point of CDs during that time
9 frame?

11:33:42 10 A. There really wasn't a general price point. If you looked
11 at between box sets, which could be sold in, you know, the
12 upper hundred dollars to a normal -- if you took a standard CD,
13 it would sell probably somewhere in the 15 to \$16 range per, at
14 retail.

15 Q. If we could please pull up PX 486.

16 Mr. Flott, where on this chart does it reflect
17 peer-to-peer piracy levels?

18 A. It doesn't.

19 Q. You can take that down.

11:34:35 20 Counsel asked you some questions about a transaction
21 between Access Industries and the acquisition of Warner Music
22 Group. Do you recall a three billion number?

23 A. Yes.

24 Q. What did that three billion transaction cover in terms of
25 the geographical areas and the divisions of Warner Music Group?

1 A. It covered the world. It also encompassed all of the
2 companies within Warner Music, which is the Recorded Music
3 Division as well as the Music Publishing Division, and the
4 companies that exist underneath each of those divisions.

5 Q. And a similar question with respect to the 10k that
6 Mr. Buchanan asked you about. I believe that you provided some
7 numbers regarding the total revenues --

8 A. Yep.

9 Q. -- over 2012 to 2014; is that right?

11:35:30 10 A. Yes.

11 Q. And what geographical areas did those revenues cover?

12 A. That's the world.

13 MS. NOYOLA: No further questions, Your Honor.

14 THE COURT: All right.

15 MR. BUCHANAN: I just would move in DX 28, Your
16 Honor.

17 THE COURT: Any objection to DX 28?

18 MS. NOYOLA: That's fine, Your Honor.

19 MR. OPPENHEIM: No objection, Your Honor.

11:35:51 20 THE COURT: It will be received.

21 All right. May Mr. Flott be excused?

22 All right, you are excused with our thanks, sir.

23 Please don't discuss the testimony you have given with anyone
24 until our trial is over. All right?

25 THE WITNESS: Okay.

1 THE COURT: All right. Have a good day.

2 THE WITNESS: Thank you.

3 NOTE: The witness stood down.

4 THE COURT: All right. Next witness.

5 MR. OPPENHEIM: Your Honor, at this point the
6 plaintiffs and the defendants have agreed to the deposition of
7 Mr. Zabek.

8 THE COURT: Okay.

9 MR. OPPENHEIM: So we will play it. It includes,
11:36:23 10 obviously, both sides.

11 THE COURT: All right. So we are going to hear
12 testimony by deposition. And Mr. Zabek's deposition was taken
13 in lieu of his appearing here in court. You should consider it
14 just the way you would consider the testimony of a live
15 witness.

16 All right. Are you all set up?

17 And again, it's a witness that is being called by
18 plaintiffs, but also giving testimony on behalf of Cox as well.
19 So it's a witness for both the plaintiff and defendant.

11:37:06 20 MR. GOULD: Your Honor, would it be helpful to give
21 the jury a sense of how long this video might go so they can
22 mentally prepare for it?

23 THE COURT: Sure.

24 MR. GOULD: This video is approximately four hours
25 long.

1 kind of surgery. We can't -- we were unable to pinpoint -- not
2 looking at every data that's coming out of our customers'
3 locations to see, was it that, was it their full network, who
4 was actually doing this. You're talking thousands of people on
5 something like that.

6 So we're erring on the side of caution, talk to our
7 legal department and see where we can go from there.

8 Q. So do you think that there's any instance where it's
9 appropriate for Cox to allow a business subscriber to be the
10 subject of thousands of infringement notices without Cox
11 terminating the account?

12 A. I can't think of a situation at the present time. If
13 there's a public WiFi, they may not even know what's going on,
14 even after we contacted them. There's a lot of gray possible
15 area in there, but we don't want copyright infringement
16 happening on any of our networks, whether it was CB or even
17 HSI.

18 Q. Mr. Zabek, I'm going to hand you what's been marked as
19 Plaintiffs' 276, which is an e-mail exchange between you and an
20 individual by the name of Jason Barnhardt in March of 2011.
21 Did I mispronounce that name?

22 A. No, not at all.

23 Q. And this is an e-mail exchange -- excuse me, the Bates
24 label on this is COX_SONY_00005540 through 41.

25 In this, it appears that Mr. Barnhardt is sending you

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
: :
SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
: :
-vs- : Case No. 1:18-cv-950
: :
COX COMMUNICATIONS, INC., et al., :
Defendants. :
: :
-----:

VOLUME 7 (A.M. Portion)

TRIAL TRANSCRIPT

December 10, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 address from the complaint.

2 And since IPs can change over time, they are
3 technically dynamic, for the most part, they -- almost all of
4 them are going to typically be dynamic.

5 Then we're going to use that date and time that the
6 complaint says the event occurred, and we're going to use that
7 combined with the IP and possibly the port and see if we can
8 match up, you know, find a record where the IP at that
9 particular time, you know, which device was that associated
10 with, which customer account is that, in turn, associated with.
11 So that's typically the flow that we're going to follow.

12 Q. And, Mr. Beck, does determining the account also determine
13 the user that engaged in the alleged behavior?

14 A. No, that's not really possible.

15 Q. Why not?

16 A. That's -- it's not really a technically possible sort of
17 thing. I mean, we can -- the IP will match up to most likely a
18 cable modem or something of that nature, and then that modem
19 is, of course, you know, associated to a particular customer
20 account. But, you know, within a customer's home, you know,
21 there could be multiple people. We don't really know who's
22 actually using the internet at that time. It could be any
23 number of situations. I mean, typically, it's going to have
24 multiple people in it.

25 Basically if you see a car speed down the road, you

1 can report the tag, but you don't really know if the owner of
2 the car was driving or their spouse or their kid or their
3 neighbor or their guest.

4 Q. Well, and is it possible for someone other than a family
5 or household member to use an account service?

6 A. Oh, certainly. So, you know, you could have people
7 visiting, of course. You could have guests in the home. You
8 could have a neighbor on the WiFi, especially if you, you know,
9 bought a new router, plugged it in, and didn't realize that the
10 default password was "password." That happens. So your
11 neighbors may figure that out and get on there and think that
12 they get free internet by just riding on top of yours. So
13 there are certainly cases where that can happen, and that's
14 just in the residential space.

15 If we get into other use cases, you could see
16 certainly other people involved with business use cases, that
17 sort of thing.

18 Q. Well, does Cox have both residential and business
19 subscribers for its internet service?

20 A. Absolutely. We certainly do.

21 Q. And does CATS receive copyright notices directed to Cox
22 Business subscribers as well as residential subscribers?

23 A. Certainly. Absolutely.

24 Q. And might a business account also have multiple users?

25 A. Even more so, I would say. Absolutely.

1 Q. Can you give us an example?

2 A. Sure. I mean, even if we just start with a small
3 business, you know, all of their employees. It could be -- you
4 know, any of those employees could be using the internet. I
5 would imagine most of them probably would just in day to day.

6 But, I mean, working up the, up the line with
7 business, you have all sorts of these cases. So they may offer
8 guest WiFi services, you know, maybe they have a guest WiFi in
9 their waiting room and -- or it's a small restaurant or
10 something, maybe they have WiFi in their cafe.

11 But then you get into larger use cases with
12 commercial, too. So you could have situations like
13 universities. You could have situations like military bases.
14 You could have hospitals. We certainly have a number of
15 hospitals as customers.

16 So even -- there are even hospitality cases like
17 convention centers. That's going to be a huge number of users
18 really. So there are definitely some, some situations like
19 that.

20 Q. Now, once CATS identifies the subscriber, is Cox able to
21 contact the subscriber?

22 A. Yeah, typically. A customer account is going to typically
23 have contact information on it, yeah.

24 Q. And once a ticket is created in CATS, what does CATS do
25 with the complaint?

1 comply with this AUP. Customer is responsible for ensuring
2 that all accounts, sub-accounts, and alternative account names
3 associated with Customer's principal account comply with this
4 AUP. In the event of a suspected violation of this AUP,
5 Customer will cooperate with Cox Business and will promptly
6 provide Cox Business with information about Customer's
7 end-users upon request from Cox Business.

8 Did I read that correctly?

9 A. I was doing a little bit of reading of my own at the same
10 time.

11 Q. You understand, sir, that this says that the Cox Business
12 customer is responsible for the end user's activity through
13 their account?

14 A. As stated here, yes.

15 Q. Thank you.

16 Now, you testified about, something about military
17 bases, customers who are military bases, but you understand,
18 sir, that Cox doesn't provide internet service to the military
19 base itself, correct? In fact, Cox provides perhaps internet
20 service to housing on a military base?

21 A. I can't say that we do or don't do base versus
22 residential. I know we have military customers. I know we
23 have military bases that are customers.

24 Q. You think that Cox has military bases that are actual
25 customers?

1 A. It's possible. I don't know.

2 Q. You don't know.

3 A. I mean, I don't know the distinction. I know that we have
4 military bases that are customers. I don't know what the
5 individual situations are of the users that are using those
6 services.

7 Q. Would it surprise you if those services were provided to
8 housing on the military bases?

9 A. No.

10 Q. And you would agree that U.S. government and the military
11 both prohibit copyright infringement?

12 A. That's what we're discussing here, I'm sure.

13 Q. You testified about a number of e-mails that Cox received
14 from customers in response to infringement notices from the
15 plaintiffs. Do you recall that?

16 A. Yes.

17 Q. Do you see, Mr. Beck, that DX 455 is actually an e-mail
18 from Cox?

19 A. Yes. That's from abuse@cox.net.

20 Q. And it may have an e-mail from the customer down below, so
21 this is a response likely to a customer?

22 A. From the highlighted sections, I can't tell who the
23 response is to.

24 Q. Well, we can scroll down and take a look. Do you see that
25 the customer's name is redacted for confidentiality? Let's

1 business customer typically communicated about that notice?

2 A. Yes, I am.

3 Q. And can you describe that for us?

4 A. For business customers, due to the nature of their
5 business, we usually want to work directly with them if we can.
6 We try our best to avoid suspending them if we can because that
7 can have an impact on -- a heavy impact on their business. So
8 with a business customer, although we'll often send them an
9 e-mail, it's often as a follow-up to a phone call. They prefer
10 to call business customers directly and speak with them
11 directly to deal with issues like that.

12 Q. And, Mr. Beck, are you aware of the total number of RIAA
13 notices that came in to Cox Business customers?

14 A. For business customers, generally speaking, our business
15 customer complaint volume, you're going to be looking at 20 to
16 30 percent of the volume of RIAA's complaints are for business
17 customers.

18 Q. Okay. And with respect to the set of 1,700 e-mails that
19 counsel was asking about, those are the written responses from
20 Cox customers to Cox in response receiving a notice, the
21 business customers may be calling back in; is that right?

22 A. That is true. Even the residential customers will often
23 pick up the phone. Especially in this day and age, with this
24 much phishing and stuff goes on, if they see an e-mail that
25 says something is going on with the Cox service, they may be

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al., :
Defendants. :
-----: :

VOLUME 7 (P.M. Portion)

TRIAL TRANSCRIPT

December 10, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 response program at Cox originated?

2 A. I do.

3 Q. Could you tell the jury.

4 A. I invented it.

5 Q. And why did you develop this?

6 A. It's the most effective way of communicating with
7 subscribers.

8 Q. When did you develop it?

9 A. Early 2000s, probably 2002/2003 time frame.

10 Q. What is the purpose of engaging in escalating steps with
11 customers related to copyright infringement?

12 A. We need to make sure that we reach the actual account
13 holder, and sometimes that can be tricky.

14 Q. And what, if anything, have you done to determine whether
15 the graduated response at Cox was effective?

16 A. I have run a number of queries in the CATS database to
17 check repeat offense rates.

18 Q. When did you do that?

19 A. I did it throughout my time. It was something that I did
20 just as the normal course of my job.

21 Q. How often would you do it?

22 A. It wasn't a set schedule, but I would say quarterly,
23 probably.

24 Q. And what did you observe when you ran those queries?

25 A. The program was very effective. The vast majority of

1 customers never made it past the e-mail warning stage.

2 Q. Now, how do you know that?

3 A. I ran the numbers myself.

4 Q. Does CATS sometimes aggregate complaints or notices into a
5 single ticket?

6 A. It does.

7 Q. What does that mean, to aggregate complaints?

8 A. So when the first allegation comes in against a
9 subscriber, it generates a ticket in the CATS system. And then
10 for 24 hours any subsequent allegations that we get are
11 appended to that one ticket rather than generating a new
12 ticket.

13 Q. But why does CATS aggregate complaints rather than
14 treating each one as a separate incident?

15 A. Fairness for the customers. If every single notification
16 generated a new ticket, then we could potentially have someone
17 go through all steps of the program up through termination
18 within a few minutes before they had even had a chance to look
19 at the issue.

20 Q. How many copyright notices will CATS aggregate?

21 A. There is no set limit.

22 Q. Do you know whether Cox also has a limit on the number of
23 customers CATS can automatically suspend?

24 A. It does.

25 Q. Why was there -- why was a suspension limit imposed, if

1 Q. Why?

2 A. We're concerned that it will set a precedent that ISPs
3 will be required to monitor their subscribers and try to
4 determine if they are violating copyright.

5 We are also concerned about the precedent that ISPs
6 might be responsible for crimes committed by their customers.

7 So if we, as an ISP, are responsible when our
8 customers violate copyright, what else might we be responsible
9 for? If one of our customers uses our service to buy drugs,
10 are we drug dealers now?

11 MR. ELKIN: Pass the witness.

12 THE COURT: All right, Mr. Oppenheim.

13 MR. OPPENHEIM: Thank you, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. OPPENHEIM:

16 Q. Mr. Carothers, you testified at some length about security
17 issues in response to Mr. Elkin's questions, correct?

18 A. Yes.

19 Q. There were no security concerns with the notices that were
20 received from the RIAA, were there?

21 A. No, none that I am aware of.

22 Q. Do you believe that Cox takes copyright infringement
23 notices seriously?

24 A. Absolutely.

25 Q. So when you testified in response to Mr. Elkin's questions

1 there's something that's 6 or 7 or 8 inside of that.

2 Q. And it says the data set was validated against Cox
3 high-speed Internet Procera data.

4 Could you explain what that means?

5 A. Yes. So the -- I'm just checking the year. Yeah, it says
6 2011. It's not -- it's not labeled there.

7 So this is basically our what we'll call, outside-in
8 view that I've described with leveraging some of the
9 third-party data.

10 The middle column is our estimate as to what we
11 believe Cox's demand would be. Right?

12 Q. Uh-hum.

13 A. So we had taken the national -- the national forecasts,
14 came up with our own view, and possibly adjusted it thinking
15 about Cox's footprint. So that was a view that we developed,
16 you know, entirely or almost entirely on our own.

17 Q. And is it correct that this data that inCode provided to
18 Cox showed Cox that at least in terms of the forecast, was that
19 the downstream data consumption for those that engage in
20 peer-to-peer was forecast to increase in each of the years from
21 2011 through 2015, correct?

22 A. Correct.

23 Q. And in this data that inCode provided to Cox, with respect
24 to upstream traffic, it reflects that in each of the years from
25 2011 to 2015 data consumption demand for those that engaged in

1 peer-to-peer usage was forecasted to increase year over year?

2 A. Yes.

3 Q. And if you could turn to the High Household Profile
4 section of this excerpt.

5 Do you see that?

6 A. Yes.

7 Q. Does this reflect that inCode forecasted to Cox that for
8 those that engage in peer-to-peer activity, that their overall
9 data consumption for peer-to-peer would increase in each of the
10 years for 2011 to 2015?

11 A. Yes.

12 Q. In 2011 the Procera data showed that 12-and-a-half percent
13 of the data of Cox's network was being used for peer-to-peer
14 file -- file usage, correct?

15 A. Yes.

16 EXAMINATION

17 BY MS. LEIDEN:

18 Q. Could you first turn to the document that Mr. Zebrak
19 marked earlier as Exhibit 94. That's the hard copy of the
20 spreadsheet that you were looking at electronically.

21 A. Okay.

22 Q. Just a couple of clarifying questions on this data. If
23 you flip to the second tab after the first blue page, the page
24 titled Summary of Data Usage.

25 A. Yes.

1 Q. And I believe that you testified earlier that this
2 broadband consumption analysis took place predominantly in
3 2012, correct?

4 A. Yes.

5 Q. And does the 2011 data here reflect actual data?

6 A. No. This is our view of what actual data would be. It
7 was then subsequently compared against Cox's Procera tool, but
8 this is our outside-in view, as you call it.

9 Q. And when you say, outside-in view, is that because the
10 data is based on information from the third-party sources?

11 A. Yes.

12 Q. Such as Cisco?

13 A. Yes.

14 Q. And for the other years on this spreadsheet, 2012 through
15 2015, you testified that those were forecasts that inCode had
16 come up with, correct?

17 A. Yes, based on, you know, the third-party research.

18 Q. And going back to the 2011 data, and specifically talking
19 about this page of this spreadsheet for now, was any of this
20 data under 2011 a reflection of the broadband consumption of
21 Cox subscribers specifically?

22 A. Well, the -- the -- in a few of the fields we gained
23 insights from Cox to help form this. Okay. I believe in the
24 peer-to-peer session usage, I'll call it, as I pointed out
25 earlier, and there may have been others, but it was more of

1 a -- a -- getting a variety of inputs that then fed our model,
2 which was primarily based on external research.

3 Q. Thank you. And for this specific page of the spreadsheet,
4 just to make sure I understand, for the 2011 data, are these
5 figures the data that inCode first received from external third
6 parties, such as Cisco, and compared to the Procera data?

7 A. Well, we -- we developed the bottoms-up view, the usage
8 per application or this category we called it, and developed
9 this -- the numbers on this page through primarily the outside
10 sources, fed a little bit through some -- some inCode subject
11 matter experts, and a little bit from -- from Cox's -- the
12 interviews that we did with Cox. Developed these numbers. And
13 then as one event towards the end of the project, compared it
14 with Cox's Procera data.

15 Q. And would it be your testimony that this data -- and
16 again, just talking for now about the data on this tab of the
17 spreadsheet -- well, I believe that you testified that it was
18 national data, correct?

19 A. Yes, I believe that the -- here on the total yearly
20 traffic, it's an -- it's an estimate for national data.

21 Q. And that would be the same for the 2011 data as well as
22 the 2012 through 2015 forecasts?

23 A. Yes.

24 Q. And if you could flip to the next tab of the after the
25 next blue page, the page titled Summary of Activity Types.

1 I would just like to clarify essentially the same
2 question. Which is that the 2011 data reflected here is -- was
3 that data also based on inCode's review of third-party data
4 from Cisco and other sources?

5 A. Yes, primarily.

6 Q. Could you explain what you mean by primarily?

7 A. So this is the -- in the spreadsheet you'll see notes as
8 to the source of different components of the analysis. The
9 primary sources were Cisco, Analysis Mason, and the other one,
10 the one that we went through. Here we go. Informa.

11 But we used other sources as well. And as I
12 indicated, for a couple of the drivers we interviewed Cox and
13 got some inputs that then fed into this model.

14 But the overall compilation of this analysis was, you
15 know, our summary view of the average traffic per household,
16 you know, across the United States.

17 Q. And again, for this tab of this spreadsheet, that would be
18 the same for the 2011 actual data and the 2012 through 2015
19 forecasted data?

20 A. Yes.

21 Q. None of this data in this document that you have in front
22 of you then reflects solely activity of Cox subscribers,
23 correct?

24 A. None of it does.

25 NOTE: The video deposition is concluded.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al., :
Defendants. :
-----: :

VOLUME 8 (A.M. Portion)

TRIAL TRANSCRIPT

December 11, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 know.

2 So if you try to basically, you know, download a file
3 and the connection is too small, it's like trying to drive on
4 the highway in a Model T Ford, you know. It's not going to be
5 a pleasant experience.

6 You know, whereas if you have a very fast speed
7 service, you'll download files quickly, you can download more
8 of them. And you'll also, you know, have -- it won't interfere
9 with other things that you're doing.

11:12:23 10 Q. Now, on this notion of -- the second and third point: P2P
11 consumes more bandwidth and was a key driver of Cox's
12 bandwidth.

13 Did you prepare a slide showing some of the
14 information you considered?

15 A. Yeah, I did. I mean, what's important to understand is
16 that it -- you know, the broad -- the companies that provide
17 broadband service have to manage their network and provision
18 their network for the peak traffic loads. And they also want
19 to look at sort of what people are doing and what -- you know,
11:12:55 20 what kind of services they have so they can give those
21 customers the experience those customers, you know, want and
22 expect.

23 And so, they look at the different types of traffic.
24 And if you have someone that all they're doing is e-mail
25 occasionally, they're not moving a lot of data and they're

1 not -- they don't need a very fast high speed service.

2 If someone's doing something like peer-to-peer,
3 that's one of the most intensive -- bandwidth intensive
4 services, both on the upload and the download, that broadband
5 subscribers do.

6 And this slide is -- you know, pieces out of a
7 consultancy report that was prepared by this company, inCode
8 that, you know, provided advice to Cox on sort of, you know,
9 what they should be expecting in the future, what traffic
10 looked like in the Internet, what traffic looked like, and what
11 other, you know, broadband providers around the country were
12 doing.

13 And what this one says is basically what I've been
14 saying. Is that peer-to-peer is the most bandwidth intensive
15 category. And this one shows that, you know, peer-to-peer
16 households were 13 percent of all broadband households. Which
17 is a much higher number, for example, than the 60,000
18 subscribers that have been identified here relative to the
19 4.5 million broadband subscribers that Cox had.

20 So 60,000 over 4.5 million is well less than
21 13 percent. Which would suggest and is consistent with the
22 inference I make that we were only observing a subset of the
23 actual infringement that was happening on the network.

24 But this is -- this one is showing that this is a
25 heavy use thing.

1 Now, the lower chart is showing the forecast that
2 these consultants prepared for sort of the typical household's
3 monthly usage. And so, there are three lines here. There's a
4 yellow line, a red line, and a green line. And in its models
5 for coming up with these forecasts, it characterizes what these
6 firms -- you know, what these types of households do.

7 So the yellow lines are households that are doing --
8 you know, using the Internet relatively lightly. And their
9 bandwidth demand is relatively low. And they're candidates for
10 this Starter or Essential tier, the lower priced services, you
11 know, these lower dark blue bands that run across.

12 But if you're in the red band, you need to be in the
13 Preferred tier.

14 And if you're a green type of customer, you need to
15 be the Premiere band or the Ultimate tier because your
16 utilization doesn't fit with the experience you have.

17 Now, the users of peer-to-peer are most likely to be
18 in this green band or the red band, but certainly not in this
19 yellow band.

11:15:39 20 So just understanding the character of what
21 peer-to-peer is and what people are doing, and understanding
22 that peer-to-peer is almost all infringing activity, Cox is,
23 you know, listening to and knows -- this is evidence that Cox
24 internally knew that the customers that were doing peer-to-peer
25 were more likely to be customers and candidates for its more

1 expensive broadband services.

2 So that's a piece of evidence. That's some of the
3 evidence that goes with the general understanding of how the
4 business operates.

5 Q. And how does this tie in, Dr. Lehr, to your opinion that
6 Cox had an economic incentive to tolerate infringement?

7 A. Well, these customers that are providing and are in the
8 higher tier services are more profitable than the lower tier
9 services because almost all the costs of providing the service
10 to the customers is fixed, it doesn't really depend upon the
11 actual use of the customers.

12 So, for example, when customers are heavy users, they
13 may not be heavy users during the peak period, which is when
14 they size the network.

15 It's like you figure out how big a pipe do I need
16 during my busiest hour to make sure that the customers that I
17 promised service to get the service they expect. But if
18 customers use that pipe when it's not particularly busy, then
19 that doesn't cost me anything because I have the pipe there
20 anyways.

21 Q. Now, did you have any access to Cox data that reported the
22 actual tier, the actual tier that the direct infringing
23 subscribers in this case subscribed to?

24 A. No, I don't, because the ICOMS billing data just says what
25 they were billed, but it doesn't tell me what tier those

1 customers were in. And so, I didn't have that data, but I do
2 have the ICOMS data and the ticket data. So there are things I
3 can infer from that.

4 Q. So just remind us, sir, what's the ICOMS data?

5 A. The ICOMS data is the internal billing system. So they
6 keep this for all their subscribers. But, you know, the subset
7 of the data we got was for those subscribers who had been
8 identified as infringing subscribers in the CATS data with one
9 or more DMCA tickets. And then we had their revenue payments
10 from 2012 to 2016.

11 Q. And were you able to look, sir, at the Cox billing data
12 for the direct infringers in this case and draw conclusions
13 about their relative value?

14 A. Yeah. So one of the things you can do is you can say,
15 let's look at the data payments. So not all the revenues they
16 billed, but the data payments which shows up in two different
17 elements within the dataset for each customer. And you can
18 say, what was the average of only those subscribers, the
19 average billing per month for only those subscribers that
20 received one to two tickets? And we can -- can we compare it
21 to subscribers that received more tickets.

22 And so, for example, can we compare it to subscribers
23 who got 20 or more tickets? So if you got 20 or more tickets,
24 the evidence is showing you are, by the evidence, assuming the
25 evidence straightly maps directly to your infringing behavior,

1 that you're a heavier infringer.

2 When you do that comparison and you apply statistical
3 tests, you find that there is a statistically significant
4 increase in the data billed and revenues paid by the more heavy
5 infringers.

6 So this is data from a limited subsample of Cox's own
7 internal billing of these infringing subscribers that have been
8 identified as infringing that statistically shows that there is
9 a large, 8 percent increase in the data billings to those
10 subscribers.

11:19:30

11 And that, you know, goes as consistent with the other
12 stuff, stuff their internal documents and what you would
13 otherwise infer.

14 Q. What do you mean by statistically significant?

15 A. You apply statistical tests and say, given the size of the
16 sample I have and the variability in that sample, is this a
17 difference that looks as if it could be explained as just
18 random, or does it look like it's actually, you know,
19 statistically significant.

11:19:56

20 Q. And it looks like -- the 8.4 percent increase, what
21 charges does that relate to?

22 A. That's just the charges associated with their payment for
23 data services.

24 Q. And it looks like it's about a six-and-a-half or so dollar
25 incriminate. \$6 doesn't seem like that big of a difference.

1 Why does that matter here?

2 A. Well, first off, you know, as an economist and someone who
3 cares about looking at the data, it is statistically
4 significant. So that matters. 8 percent is a big difference.
5 That is more an trivial amount.

6 And six bucks does make a difference. It makes a
7 difference to individual subscribers. I would certainly care
8 if my bill was \$6 more or less for this.

9 And if you have 60,000 subscribers that there might
11:20:45 10 be this kind of difference or incentive, or, you know, some
11 number of subscribers -- you remember, Cox is dealing in
12 subscriber numbers that are in the millions, hundreds of
13 thousands, tens of thousands. You multiple that, that's a big
14 number. That's a big additional incentive.

15 It's not like the subscriber that charges 43 bucks or
16 even 30 bucks a month in data services isn't profitable for Cox
17 and Cox doesn't want to retain that subscriber. It's just that
18 they really want to retain these subscribers that are more
19 valuable. And if they're higher infringing, it looks like
11:21:19 20 they're valuable.

21 Q. How does that tie into your opinion that Cox benefited
22 from retaining these direct infringers?

23 A. Well, it speaks to the economic incentive that Cox had to
24 retain, you know, repeat infringers on its network even when it
25 knew, you know, that it had -- these were repeat infringers,

1 and that it's incentives were greater when these repeat
2 infringers -- there is evidence suggesting that they were even
3 heavier infringers.

4 Q. I want to move to the next part of this opinion.

5 You said that Cox saved by not addressing
6 infringement. What do you by that, sir?

7 A. Well, I talked a little bit about that in my opening
8 statement. So had Cox addressed the infringement more
9 aggressively, you know, they would have probably had to deal
11:22:10 10 with more customer service calls. They would have had to mail
11 more notices and had more interactions to deal with
12 subscribers. They would have incurred direct costs associated
13 with the response.

14 They probably couldn't have gotten away with reducing
15 the personnel of the department that was dealing with the abuse
16 stuff, as they actually -- as I understand they actually did.

17 But, you know, so they would have incurred additional
18 costs.

19 Q. Were able to quantify the costs saved by Cox by not
11:22:44 20 addressing the infringement?

21 A. I wasn't able to quantify these because, first off, I'm
22 not offering an opinion here about what more and specifically
23 Cox should have done. And what Cox specifically might have
24 done would affect what the incremental costs would have been.

25 But certainly they should have done more than they

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
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VOLUME 8 (P.M. Portion)

TRIAL TRANSCRIPT

December 11, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 Q. And did the Cox product marketing team play any role in
2 the preparation of this study?

3 A. Yes. We were the customer for a document like this.

4 Q. And was this study conducted by Cox in the ordinary course
5 of its business?

6 A. Absolutely.

7 Q. And was this document maintained by Cox in the ordinary
8 course of business?

9 A. Absolutely.

10 MR. ELKIN: Your Honor, I would offer into evidence
11 Defendants' Exhibit 239.

12 THE COURT: Any objection?

13 MR. ZEBRAK: No objection, Your Honor.

14 THE COURT: It's received.

15 MR. ELKIN: Thank you, Your Honor.

16 BY MR. ELKIN:

17 Q. Mr. Negretti, could you just explain to the jury what this
18 study is?

19 A. Yeah, absolutely. So this document that we're looking at
20 here was done, like many documents, to understand different
21 ways that we could package our internet services. As the
22 environment became more and more competitive, as we spoke about
23 earlier, it became important for us to understand are there
24 different things that we could package together in our internet
25 service to make our internet service more attractive to the

1 consumers in the marketplace.

2 Q. Okay. And what's the date of this?

3 A. This was done in August of 2014.

4 Q. Okay. Turn to the second page of this exhibit, and can
5 you read the second sentence under the word "Objectives"?

6 A. Starting with "Cox management"?

7 Q. Yes, sure.

8 A. Sure. Cox management seeks to explore alternative ways of
9 packaging its internet services to both increase appeal among
10 key consumer segments and simplify decision making.

11 Q. Why did Cox management want to do this?

12 A. Again, the environment continues to be competitive in the
13 marketplace, and at this time, it was very competitive, with
14 alternative sources of high-speed internet available to them,
15 and so Cox wanted to make sure that we had the best products
16 and services for the customers to choose from in the
17 marketplace, and so this was --

18 Q. And how did this study concern itself with understanding
19 how Cox's customers use the internet?

20 A. There's a couple different ways. It asks them when you're
21 making a selection for your internet provider, what's important
22 to you? And then when you're using the internet, what's
23 important to you? And then it asks them to give us answers
24 based off of that.

25 Q. Okay. Turn to the sixth page of this exhibit. It should

1 the consumer is actually using inside their home.

2 So this talks about, again, a stack ranking based on
3 choices that the consumer was given about what they're using
4 the internet for.

5 Q. And how does streaming audio and video relate to
6 downloading in terms of what's more prevalent --

7 A. Well, first of all --

8 Q. -- that's depicted on this slide?

9 A. -- as you see here, it's actually 20 percent more
10 important to a consumer in terms of what they're using the
11 internet for than downloading speeds, for example, downloading
12 things.

13 Q. And have you observed trends in your work at Cox in how
14 consumers use the internet to consume music?

15 A. Sure, absolutely.

16 Q. Could you comment on that?

17 A. Sure. Again, then, just as today, there are services such
18 as iHeartRadio, Pandora, and Spotify available to a consumer to
19 allow them to stream music services into their home, not only
20 onto their, you know, laptops and tablets, but also on their
21 phones so they can use inside and outside of the home to be
22 able to listen to music.

23 MR. ELKIN: Okay. You can take that down, James.

24 BY MR. ELKIN:

25 Q. In your job, did you ever review at any time any surveys

1 A. Yes. So this is a relatively simple document. This is a
2 rate card basically. This tells us internally at Cox
3 Communications the different rates that we charged in 2013,
4 according to this sheet here, and then there's a second tab for
5 2014, that we charged for our internet services.

6 And the simple way to read this is on the left-hand
7 side or the left axis, the Y axis, was a list of all the
8 different cities in which we offered our high-speed internet
9 service in 2013. Then along the top of the page, or the X
10 axis, was a list of the five or six different internet tiers
11 that we offered our consumers -- our customers at that point in
12 time. There were starter and essential tiers, which were lower
13 speed tiers, on up to premium and ultimate, which were higher
14 speed tiers.

15 And then this simply is a rate card that lists out
16 the rates that we charge for a customer who had other services
17 with us as well as internet, such as cable TV and/or telephone
18 service or just purchased internet by itself.

19 Q. And what were the years covered by these rack rates?

20 A. I'm sorry, say that again?

21 Q. What were the years covered? What years?

22 A. Yes. So again, this is 2013 on this page here. There's a
23 subsequent tab at the bottom that shows the rack rates for
24 2014.

25 Q. And why are there different -- on the left-hand side of

1 each of these two pages, there are different locations. Why,
2 why do you have different locations?

3 A. Yeah. So we serve different parts of the country with our
4 internet services, and so at that point in time, these
5 individual markets, as we call them, or cities all had their
6 own responsibility for creating these internet services and
7 distributing them to our customers, and so this shows the
8 different rates that were charged. A lot of them started to be
9 the same, but there are some differences in different parts of
10 the -- in different parts of the geography.

11 Q. Will the rack rates vary by geographic region?

12 A. Yes. There are some examples here, for example, where in
13 Kansas, Arkansas, we charge 46.99 for our essential product,
14 and in Tulsa, Oklahoma, we charge 44.99 for the same product.

15 Q. Okay. And what are the differences among the different
16 tiers of services?

17 A. Sure. There are two key differences. Key difference
18 number one, as I mentioned, is the download speed or the speed
19 of internet service. So again, the starter and the essential
20 tiers, they were slower tiers; and then the higher you go
21 across this page, the faster those internet service speeds
22 would be.

23 And then the second difference would be the amount of
24 data consumption that you would get with each of these tiers.

25 Q. And could you take the jury through the differences in the

1 amount of data that a subscriber can use for different tiers of
2 service?

3 A. Yes. So I don't have the exact amounts of data off the
4 top of my head, but what I'll say is similar to the speeds, the
5 more speed you purchase and the more you pay for your service,
6 the more data consumption that you are allotted for each of
7 those tiers.

8 Q. Was there a limit on the amount of data that they could
9 use?

10 A. There was a limit.

11 Q. Do you know whether or not those limits were enforced
12 during the 2013 to 2014 period?

13 A. Unfortunately, they were not enforced.

14 Q. So in your experience, what factors are the most important
15 in driving consumer preference -- you can take that down.

16 Sorry. Withdrawn.

17 In your experience, what factors are the most
18 important in driving consumer preferences for increased speed?

19 A. Again, we've been talking a lot about this in the last
20 half-hour or so, but it comes down to the speed and the price
21 that they pay for the service based on what they want to use it
22 for, being able to use it in their home to be able to get to
23 things like Netflix, streaming video through their iPhone or
24 their tablet, for example.

25 Q. So in your -- in your knowledge and capacity in product

1 deposition, right?

2 A. That's correct.

3 Q. Did you see that document in the few weeks you spent
4 preparing for today's trial as well?

5 A. I did not, no.

6 Q. So could you turn -- well, first of all, in this final
7 readout, inCode had verified its, its analyses by matching it
8 against actual Cox usage data, right?

9 A. I do recall that, right.

10 Q. Can you turn to page 4 of this document, sir? So -- and
11 specifically, if you could look under where it says Data Usage
12 Trends and look at the third bullet point?

13 If you could highlight that, Mr. Duval?

14 A. Sure.

15 Q. Excuse me, the second bullet point. My apologies. I'm
16 looking sideways. That's my fault.

17 Do you see where it begins with: The average
18 household?

19 A. Yes.

20 Q. So here it says the average household in 2011 used 37.3
21 gigabytes per month of traffic, right?

22 A. That is correct.

23 Q. And so that's less than half of the average peer-to-peer
24 household, right?

25 A. Well, yes, by mathematical standards, that's correct.

1 Q. Right. And to -- the more data that you use, the more
2 speed you need, right?

3 A. I'm sorry, could you repeat that?

4 Q. More data requires more speed, right?

5 A. Yes. Usually, yes.

6 Q. Right.

7 A. It's not a requirement, but usually people who want more
8 data will get more speeds.

9 Q. Right. And could you turn, sir, to page 25 of this
10 document? So this slide is profiling online activities for Cox
11 to use as inputs for a data calculator, right?

12 A. This is correct.

13 Q. And a data calculator is where Cox tells its customers by
14 engaging in the following type of activity, you use the
15 following kind of data, and it helps them forecast what tier to
16 subscribe to, right?

17 A. Yes. It's a very helpful visual to be able to get a
18 customer to understand what they could use the internet for,
19 correct.

20 Q. Sure. And can you look at the right column that says Life
21 Style Activities?

22 A. Yes.

23 Q. And do you see where it says P2P BitTorrent?

24 A. I do see that.

25 Q. Does Cox regard P2P and BitTorrent as a lifestyle

1 Q. Okay. Sir, I'm going to remind you of something you said
2 when I deposed you, which we've already established that you
3 tried to tell the truth and were under oath, right?

4 A. That's correct.

5 Q. Okay. So page 65 of your deposition, beginning at line 7:
6 So is downloading of music one of the online activities that
7 Cox has advertised in terms of activities where speed can be
8 used?

9 So when downloading music was part of the consumer as
10 a whole, their need to access internet, the internet, when that
11 was important and popular, then that was a marketing message
12 that became effective for us to use.

13 A. That's correct.

14 Q. Okay. So marketing your service to download music has
15 been effective for Cox, correct?

16 A. Has been effective at different points in time but is not
17 currently an effective message that we use.

18 Q. So you're saying that today, Cox doesn't advertise
19 downloading music?

20 A. That's correct.

21 Q. So why don't we look at -- well, are you aware, sir, that
22 Cox for many years has tried to sell its service by relating
23 speed to downloading music in the form of a hundred songs in
24 three seconds?

25 A. That's correct. That is the visual imagery that we were

1 trying to connote when it came to music.

2 Q. Right. So you admit that for many years, including 2013
3 and '14, Cox has advertised speed in relation to downloading
4 music, correct?

5 A. I don't know if it was many years, but definitely during
6 that time frame is correct.

7 Q. And that includes --

8 A. It was in association with our gig internet products, yes.

9 Q. And that includes downloading a hundred songs in three
10 seconds, right?

11 A. Correct.

12 Q. Right. And by doing the simply math, a hundred songs in
13 three seconds would be a thousand songs in thirty seconds,
14 would it not?

15 A. That's correct.

16 Q. Okay. Sir, I'm going to show you a document that's
17 already been admitted as evidence in this case as PX 1, and I'm
18 just going to actually just pull it up on the screen. It's not
19 in the binder that you have in front of you.

20 And I'm going to ask Mr. Duval to scroll through
21 that -- or actually, excuse me, Mr. Ruelas is helping me out,
22 making me look good.

23 Why don't you take a few seconds and look at what's
24 behind tab 1. That's a list of the sound recordings that are
25 at issue in this case, and there's 6,734 of them. Take a look

1 Q. And could you explain how you reached conclusions in this
2 opinion?

3 A. Okay. So the opinion is that after each step in Cox's
4 graduated response, fewer subscribers continued to be the
5 subject of copyright infringement notices, and by the 12th such
6 notice, the notices stop for the vast majority of subscribers.

7 So that's the opinion, and I got to that opinion by
8 analysis of the RIAA notices as well as the Cox tickets.

9 Q. Okay. You used the term "vast majority." What do you
10 mean by that?

11 A. So I mean it's not -- it's more than half and it's
12 not just a little bit more than half. It's, it's the vast
13 majority. It's -- and for the cases I'm going to talk about,
14 it's over 90 percent.

15 Q. Do you have additional slides that show your analysis and
16 your results?

17 A. Yes, I do. So, so the first thing I looked at was I
18 looked at the RIAA notices. These are the notices that are in
19 the database that MarkMonitor allegedly sent to Cox. And the
20 49 percent of the at-issue subscribers here only got one
21 notice -- were only the subject of one notice from the RIAA in
22 the relevant period, which is roughly February 2013 through the
23 end of November 26, 2014. So almost half only got one.

24 When we go to three or fewer notices, 78 percent, or
25 more than three-quarters of the at-issue subscribers got one,

1 two, or three notices, were the subject of one, two, or three
2 notices from the RIAA.

3 When we get to five, 88 -- 87 percent of the at-issue
4 subscribers were the subject of five or fewer notices from the
5 RIAA. We go up a little bit more and we see that by the time
6 we get to 12 notices, that 98 percent of the at-issue
7 subscribers were the subject of no more than 12 notices from
8 the RIAA. So that means that 2 percent got -- were the subject
9 of 13 or more notices from the RIAA in this relevant period.

10 Q. Okay. Did you analyze this data in any other way?

11 A. I did.

12 Q. Did you put it on a slide?

13 A. I did. So, so the -- I have two issues with this data,
14 and the first issue is the set of subscriber accounts is
15 biased.

16 Q. Which set of accounts?

17 A. The set of accounts that are in the data, both in the RIAA
18 notice data and also, more importantly, in the, in the Cox
19 ticket data. That set of subscriber accounts is biased.

20 Q. Okay. And you say you took a deeper dive to determine
21 this bias. First, explain the bias.

22 A. Sure. So, I mean, you might think, how can it be biased?
23 It just is the set of at-issue subscribers, right? You would
24 think it's not biased, but it is biased, and let me see if I
25 can explain how.

1 the last bill or the end of the, of the claim period.

2 Q. So do you have anything else with regard to your second
3 opinion?

4 A. I don't think so. I think that's it.

5 Q. So let's go to your third opinion. Do you have a
6 demonstrative?

7 A. I do.

8 Q. Okay.

9 A. So the third opinion is -- you've heard some in this trial
10 already about some subscribers with a lot of tickets, so I
11 chose to look at the subscribers with the most tickets and
12 notices, and it turns out that the subscribers with 100 or more
13 tickets over the three-year period that we have ticket data
14 for, they're almost all commercial subscribers, and the
15 subscribers with 50 or more notices from the RIAA in that
16 relevant period, they are all, all of them -- there aren't that
17 many, but they're all of them commercial.

18 Q. Have you prepared a demonstrative for this?

19 A. Yes. So I'm going to focus on the, on the first one, the
20 subscribers with 100 or more tickets. So first you have to
21 understand the population in general. I think actually -- I
22 think Dr. McCabe actually already testified that 95 percent of
23 the at-issue subscribers are single family residential. 5
24 percent of them are commercial.

25 There's a teeny, tiny sliver that you can't even see

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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VOLUME 9 (P.M. Portion)

TRIAL TRANSCRIPT

December 12, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 Cox?

2 A. Not for Cox.

3 Q. Let's talk about step four.

4 A. Can I clarify my -- no, please go ahead, I'm sorry.

5 Q. Trust me, you'll get plenty of questions related to
6 verification.

7 A. Thank you.

8 Q. So let's talk about step four. What -- what happens in
9 step four of the Cox -- or really either of the systems?

10 A. Right. So we talked about this already, so I'll just
11 briefly recap. Right.

12 So the process -- at some point the process is
13 reaching a conclusion that some machine on the Internet, some
14 peer has an infringing file in whole or in part, and that it's
15 sitting on an IP address that is part of the Cox network.
16 Okay.

17 If it reaches that conclusion, then the e-mail notice
18 is sent. And a notice is sent to the ISP, to Cox in this case.

19 Q. Okay. And have you prepared a slide illustrating how
20 that -- what happens in that process for a business subscriber
21 to Cox?

22 A. Sure, yeah. Let's talk about that.

23 Q. What does this slide show?

24 A. Okay. So on the Internet there is -- there are devices,
25 hosts, machines, homes, et cetera, connected to the network.

1 And in its simplest form, you know, any connected device has an
2 IP addresses and -- let me back up.

3 What -- the goal, right, is ultimately to match the
4 IP address to a subscriber, an individual, somebody who is
5 basically doing the infringement. However, there is technology
6 in the Internet, there's something called network address
7 translation, or NAT, right, that allows a single IP address to
8 basically, you know, act as the connection point for many, many
9 other individuals and devices.

10 So actually most home networks even operate like
11 this, but more importantly, you know, a business might be
12 behind a NAT.

13 Q. Okay. And when a notice is directed to an IP address that
14 is a NAT, where does the notice go? What's illustrated on this
15 slide about where the NAT goes?

16 A. On this slide, what we're looking at here is basically a
17 school or some kind of organization, but the organization
18 basically is buying Internet service from Cox. That
19 organization may have many, you know, many connected end
20 points. And the notice is basically going to some, presumably
21 some e-mail address that's associated with that organization.

22 Q. And have you prepared a variation on this slide that
23 illustrates what information that notice gives you about the
24 individuals who are actually doing, supposedly doing the
25 infringing?

1 A. Sure.

2 Q. What does the notice show?

3 A. Right. So that, that individual IP address says nothing
4 about, you know, who behind that NAT actually is engaging in
5 that behavior.

6 Q. Okay. Have you prepared a slide that summarizes your
7 concerns about the way the MarkMonitor system was implemented
8 for Cox?

9 A. Yes.

10 Q. What does this slide show?

11 A. So to summarize, and to contrast with the -- with what
12 MarkMonitor did for CAS, the first two steps were substantially
13 the same. The problems come in the subsequent steps. And in
14 particular, the failure to verify that a Cox subscriber was
15 actually sharing a piece of an infringing work, in particular
16 the failure to download content, which is a prerequisite for
17 doing that verification, is a critical missing link in this
18 process.

19 Q. And finally, did you prepare a slide that states your
20 conclusion about the MarkMonitor system as implemented for Cox?

21 A. Yes, I did. Based on what I just summarized, it's my
22 opinion there's no reliable evidence that Cox subscribers were
23 sharing copies of the plaintiffs' works.

24 MR. BRODY: I tender the witness, Your Honor.

25 THE COURT: All right, thank you.

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VOLUME 10 (P.M. Portion)

TRIAL TRANSCRIPT

December 16, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 A. It could be public WiFi, it could be secure WiFi, or both.

2 Q. Well, is there information in the ICOMS system from which
3 you could determine if a customer's managed WiFi service was
4 public WiFi or was part of their secure network?

5 A. No. We just sell the managed WiFi service.

6 Q. Mr. Jarchow, to what extent does ICOMS store subscribers'
7 addresses?

8 A. We maintain an address for every location that we serve.

9 Q. Would that include both residential and Cox Business
14:30:24 10 customers?

11 A. That would.

12 Q. To what extent does the ICOMS system distinguish between
13 residential and business customers?

14 A. We have a clear delineation between the bill-type code.
15 For the residential subscribers, we use the S bill type, and
16 for the business subscribers, we use the C bill type.

17 Q. And at what time in the account creation process does
18 ICOMS create a record of a subscriber's name?

19 A. When we acquire a customer and sell them services.

14:30:54 20 Q. Does ICOMS store that account name and address information
21 in the ordinary course of business?

22 A. It does.

23 Q. Does ICOMS system contain information that would show
24 whether a subscriber's internet service was used for public
25 WiFi?

1 A. It does not.

2 Q. Does ICOMS contain information that would show whether a
3 subscriber's internet service was limited to particular
4 categories of end users like employees, contractors, guests, or
5 the like?

6 A. It does not.

7 Q. In addition to ICOMS, does Cox also have other databases
8 and systems?

9 A. We have very many, many databases and systems, yes.

14:31:36 10 Q. Mr. Jarchow, to what extent do you have knowledge of Cox's
11 other databases and systems beyond ICOMS?

12 A. My primary job responsibilities are related to ICOMS. I
13 have one or two ancillary databases that I have access to.

14 Q. And, sir, are you personally aware of any database or
15 system at Cox with information about whether a subscriber uses
16 its Cox internet service for public WiFi versus for a secure
17 computer network or for both?

18 A. No, I do not.

19 Q. Mr. Jarchow, in connection with this lawsuit, were you
14:32:09 20 asked to retrieve information about certain subscribers from
21 the ICOMS system?

22 A. Yes.

23 Q. And how do you identify the subscribers whose information
24 you were asked to retrieve?

25 A. A list of account numbers was provided by Brent Beck, and

1 MS. GOLINVEAUX: Objection, Your Honor. Scope.

2 MR. GOULD: Your Honor, this witness is listed on our
3 exhibit list as well.

4 THE COURT: Yeah, I'm going to allow the question.
5 Your exception is noted. Thank you.

6 BY MR. GOULD:

7 Q. Sir, do you understand that Cox has argued in this case
8 that it can't be expected to terminate internet service for
9 business customers for copyright violations if those customers
10 may include critical infrastructure or health care services?

11 A. I understand.

12 Q. And I think you testified that the ICOMS database from
13 which this information came doesn't actually tell Cox what the
14 customer uses that service for, correct?

15 A. That is correct.

16 Q. It could include a field here that says it's used for
17 WiFi, right?

18 A. Managed WiFi. If we sold them managed WiFi service.

19 Q. You could include a field that says this customer used our
20 service for WiFi, correct?

21 A. If we sold them managed WiFi service.

22 Q. But there's no way to distinguish based on the billing
23 records or the ICOMS database whether those WiFi users were
24 using some secured private network or a public WiFi network,
25 correct?

1 A. That is correct.

2 Q. And likewise, for a hospital client or a volunteer fire
3 station, there's similarly no way to tell on your end whether
4 the customer is using Cox's service for some secured private
5 network to, say, provide emergency services or in a lobby,
6 correct?

7 A. The ICOMS system does not have records that represent
8 secured or private or --

9 Q. Now, I've looked through these three exhibits. Would it
10 surprise you if I told you that of the 2,800 or so, there's by
11 name alone approximately 68 that appeared to potentially maybe
12 relate to some sort of health or infrastructure-type service?

13 A. Hard to say. I didn't count specific categories.

14 Q. But you looked through this whole list, and we've just
15 scanned through some pages, correct?

16 A. Yes. I've reviewed the entire list. I didn't
17 specifically count.

18 Q. Now, as the director of information technology, your job
19 duties focus on the technical support of the business systems
14:46:06 20 that Cox Communications uses to provide its services, correct?

21 A. I manage the configurations of the ICOMS billing database.

22 MR. GOULD: I'm sorry, I handed you the wrong
23 document. I apologize.

24 BY MR. GOULD:

25 Q. Sir, I want to show you a document and ask you if it

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VOLUME 11 (P.M. Portion)

TRIAL TRANSCRIPT

December 17, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 THE COURT: Do you want to give them -- do you want
2 me to excuse the jury, give them 15 minutes, and we'll --
3 where are we going after your preliminary?

4 MR. ELKIN: I just wanted to make a, just make a
5 brief, quick proffer regarding the sound recordings and music
6 publishing, if I can, with regard to the, what's in the
7 record.

8 THE COURT: Yes, sir.

9 MR. ELKIN: I'll be quick about it.

10 THE COURT: No, that's fine.

11 MR. ELKIN: So this is based on the exhibits that
12 Your Honor provisionally admitted subject to their review.

13 THE COURT: This is the 7,200?

14 MR. ELKIN: Yes. So with regard to -- so I have two
15 examples, two exemplars. One is the sound recordings, and one
16 is the publishing.

17 So what you have here under Plaintiff's Exhibit
18 4281, this is a sound recording for -- the title is "Dookie,"
19 Green Day, which is a -- covered by a separate registration,
20 and it has nine different sound recordings on it, and there is
21 another -- yes, so this is with regard to the -- this is --
22 all of these tracks, Your Honor, are actually part of the
23 works in issue in the case.

24 THE COURT: All right.

25 MR. ELKIN: And then with regard to -- I can hand

1 this out to, to Your Honor.

2 THE COURT: Thank you.

3 MR. ELKIN: Then with regard to the publishing
4 example of that, and this is Plaintiff's Exhibit 369, this
5 is -- the title of the work is Chris Brown, "I Can Transform
6 Ya," and this is a music composition.

7 And there is in the case under Plaintiff's Exhibit
8 1833 a sound recording which is owned by Sony Music which has
9 the Chris Brown song "I Can Transform Ya." So I wanted to
10 hand that up for consideration.

11 THE COURT: Are these exhibits admitted previously
12 or we'll consider that in a minute?

13 MR. ELKIN: They were provisionally --

14 THE COURT: These are part of the 7,200
15 registrations?

16 MR. OPPENHEIM: It's part of the 7,200 registrations
17 that we'll file something on after we review them posttrial.

18 MR. ELKIN: I just wanted to make the proffer, Your
19 Honor, before we rest.

20 THE COURT: Okay.

21 MR. ELKIN: That was the only purpose of this.

22 MR. OPPENHEIM: Can we --

23 MR. ELKIN: I'm not trying to sandbag anyone. I
24 just wanted to make sure, we understood Your Honor reserved
25 your decision on the issue from last night, and I wanted to

1 make sure that we at least got that in.

2 THE COURT: Okay.

3 MR. ELKIN: And then the other thing is with regard
4 to the Rule 50 motion, let me just cover the --

5 MR. OPPENHEIM: I'm sorry, can I just have a
6 question? Is this not --

7 MS. GOLINVEAUX: Yeah, cross that out.

8 MR. OPPENHEIM: Okay. Thank you. Sorry. Go ahead.

9 MR. ELKIN: That was a holdover.

10 So there were six issues that we moved under: the
11 504(c) on derivative works; the 504(c) on compilations; on
12 direct infringement, both distribution and reproduction;
13 contributory, no material contribution; vicarious both as to
14 no direct financial interest and no ability to supervise; and
15 then finally, no direct infringement by business owners, sort
16 of keying off of the Cobbler case. Those are the --

17 THE COURT: Right. Do you want to preserve your --
18 by Rule 50, yes.

19 Do you want to respond?

20 MR. OPPENHEIM: We also would like to make a Rule 50
21 motion, Your Honor. If you want to excuse the jury, that's
22 fine, or I'll do it right now orally.

23 THE COURT: Yeah, go ahead. Do it now.

24 MR. OPPENHEIM: Your Honor, we believe that pursuant
25 to Rule 50, plaintiffs have demonstrated both their

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VOLUME 12

TRIAL TRANSCRIPT

December 18, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 its network that Cox could have done something about it.

2 Let me turn to the elements of material contribution
3 and right and ability to supervise. There really can be no
4 doubt about either of these. They're not a high bar.

5 Cox built its network and provided routing services
6 and switches to direct data and content flow. Cox sold access
7 to that high-speed internet service to infringing subscribers.
8 And Cox then continued to provide unfettered service to those
9 that Cox knew were repeatedly infringing. Cox knew its
10 subscribers were infringing and yet knowingly let them continue
11 using the service.

12 Beyond creating and providing the service itself, Cox
13 provided anonymity to its subscribers. A copyright owner has
14 no ability to look at a network and tell who a particular
15 subscriber is, who may be infringing using a particular IP
16 address. Cox is the only one who knows that an IP address is
17 assigned to a particular subscriber at a particular date and
18 time.

19 And Cox testified, you heard Ms. Trickey testify that
20 Cox will not disclose the identity of its subscribers absent a
21 subpoena. That means a lawsuit.

22 All of that easily meets the low threshold of
23 material contribution.

24 Cox's AUP, the Acceptable Use Policy, both
25 residential and business, expressly grants Cox the right to

1 terminate or suspend a subscriber's account for infringement,
2 and we know, because we've seen it, that Cox has the ability to
3 terminate subscribers. It terminated 13 for purposes of
4 plaintiffs' notices for copyright infringement and 600,000 for
5 nonpayment. We clearly know they have an ability to terminate.
6 That is the right and ability to supervise the infringing
7 activity.

8 While the judge does not explain in the instructions
9 what "supervise" means, you can see that because Cox can
10 suspend or stop the infringement, that is the essence of
11 supervision.

12 The second element of the vicarious infringement
13 claim is direct financial benefit. Here the evidence was
14 clear. Mr. Zabek admitted that financial considerations were a
15 factor in making decisions about whether to terminate an
16 infringing subscriber. And, of course, we saw e-mail after
17 e-mail where Cox decided that it was not going to stop a
18 subscriber from infringing because Cox wanted to collect
19 monthly fees.

20 This is the textbook definition of direct financial
21 benefit. Cox kept the infringing customer on its network so
22 that it could keep the money coming.

23 Apart from all of the internal e-mails, Dr. Lehr also
24 did an analysis of the value to Cox of the infringing
25 subscribers based on the number of tickets that that subscriber